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POMEROY'S
EQUITY JURISPRUDENCE
AND
EQUITABLE REMEDIES,
SIX VOLUMES.

POMEROY'S
EQUITY JURISPRUDENCE,
IN FOUR VOLUMES.

By JOHN NORTON POMEROY, LL.D.

THIRD EDITION, ANNOTATED AND MUCH ENLARGED,

AND SUPPLEMENTED BY

A TREATISE ON EQUITABLE REMEDIES,
IN TWO VOLUMES.

By JOHN NORTON POMEROY, Jr.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
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1905.

A TREATISE

ON

EQUITY JURISPRUDENCE,

AS ADMINISTERED IN

THE UNITED STATES OF AMERICA;

ADAPTED FOR ALL THE STATES,

AND

TO THE UNION OF LEGAL AND EQUITABLE REMEDIES

UNDER THE REFORMED PROCEDURE.

By JOHN NORTON POMEROY, LL.D.

THIRD EDITION,

BY

JOHN NORTON POMEROY, Jr., A.M., LL.B.

IN FOUR VOLUMES.

VOL. IV.

SAN FRANCISCO:
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A TREATISE

ON

EQUITY JURISPRUDENCE.

PART FOURTH.

PART FOURTH.

THE REMEDIES AND REMEDIAL RIGHTS WHICH ARE CONFERRED BY THE EQUITY JURISPRUDENCE.

PRELIMINARY SECTION.

ANALYSIS.

§ 1315. General object.
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§ 1315. General Object.— The general nature, kinds, and classes of equitable remedies, both those belonging to the exclusive and to the concurrent jurisdictions, have been fully described in a former volume.[1] The main purpose of the discussions in this Part Fourth is to determine under what circumstances, for the protection of what primary rights and interests, legal or equitable, on the occasion of what wrongs or violations of duty, and between what parties, equity *will exercise its jurisdiction* by granting either those remedies which are peculiar to courts of equity, or those which are essentially legal in their nature and are administered concurrently by courts of law and of equity. In other words, my object is to show *what* remedies may be conferred by equity, and *when* its jurisdiction will be exercised by granting them. The entire discussion is based upon the general principles and doctrines which define the equitable jurisdiction and determine its exercise, as explained in a previous volume.[2]

[1] See *ante*, vol. 1, §§ 112–116; Ibid., §§ 134, 135; and Ibid., §§ 170–172.
[2] See vol. 1, pt. 1, c. 1, 2.

§ 1316. Classification.— The classification presented in the former volume, and referred to in the preceding paragraph, was intended merely for purposes of general description, and in order to present the active remedial system in one body. For the discussions of this Part Fourth I shall adopt the following classification, by which all equitable remedies are collected and arranged in eight separate groups: 1. The First Group contains those remedies which are purely ancillary and provisional, which do not affect any primary right nor confer any ultimate relief.[1] 2. The Second Group consists of remedies purely preventive.[2] 3. The Third Group consists of remedies which *indirectly* establish or protect interests and primary rights, whether those interests and rights are legal or equitable.[3] 4. The Fourth Group consists of remedies by which estates, interests, and primary rights, either legal or equitable, are *directly* declared, established, or recovered, or the enjoyment thereof is fully restored.[4] 5. The Fifth Group consists of remedies by which *equitable obligations* are specifically and directly enforced.[5] 6. The Sixth Group con-

[1] These are interpleader and receivers.

[2] It includes injunctions for all possible purposes; and in this connection I treat of equitable defenses in legal actions as a substitute for injunctions to restrain actions at law.

[3] They are reformation and re-execution, and cancellation, surrender up or discharge of instruments.

[4] This entire group contains three main classes: 1. Suits by which purely *legal* estates are established, and the enjoyment thereof is recovered; including assignment of dower; establishment of disputed boundaries; partition of land, and partition of personal property. 2. Suits by which some *general* right, either legal or equitable, is established; including bills of peace; bills *quia timet;* quieting title; suits to establish a will; suits to construe a will. 3. Suits by which some *particular* estate, interest, or right, legal or equitable, is established; including statutory suit to quiet title; removing a cloud from title; strict foreclosure of a mortgage or pledge; redemption of mortgages or pledges.

[5] This group contains three main classes: 1. Specific performance of contracts; 2. Specific enforcement of obligations arising from trusts; 3. Specific enforcement of obligations arising from relations analogous to trusts; including suits against fiduciary persons; suits against corporations and their officers; administration suits against executors and administrators.

sists of remedies in which the final relief is *pecuniary*, but is obtained by the enforcement of a *lien* or *charge* upon some specific property or fund.[6] 7. The Seventh Group consists of remedies in which the final relief is wholly *pecuniary*, and is obtained in the form of a general pecuniary recovery.[7] 8. The Eighth Group contains certain additional remedies which have been created and conferred by statute in several of the states, and which therefore do not belong to the original jurisprudence of equity nor to the general equitable jurisdiction.[8]

§ 1317. **Remedies Acting in Personam or in Rem.**— Before taking up these various divisions in their order, I shall present with more of practical detail some incidents common to many large classes of equitable remedies which have been alluded to in a previous volume. The fundamental doctrine of equity as originally administered has already been explained: that its remedies and decrees operated *in personam* upon defendants, and not *in rem* upon the subject-matter; that a decree was not of itself a legal title, nor did it transfer title to the plaintiff.[1] This original doctrine has been abrogated for all classes of remedies to which it could apply by statutory legislation in a large number of the states.[2] This legislation may be reduced to two

6 Embracing foreclosure of mortgages of real and personal property and of pledges, by judicial sale; enforcement of equitable liens; marshaling of securities; enforcement of the equitable contracts of married women; and creditors' suits.

7 This group contains the following particular suits: By assignees of things in action, equitable assignees of a fund, etc.; by persons entitled to participate in a common fund; for contribution in general; suits growing out of suretyship, for exoneration, contribution, or subrogation; suits growing out of partnership; suits for an accounting in general; recovery of damages.

8 In this statutory group should be placed suits for divorce; proceedings in the nature of an inquisition, for the appointment of committees over lunatics, persons of unsound mind, and habitual drunkards; statutory suits to dissolve and wind up corporations; or to remove corporate officers for cause, or for the appointment of officers.

1 See *ante*, vol. 1, §§ 134, 135, 170, 428–431, where this doctrine is fully explained; Penn v. Lord Baltimore, 1 Ves. Sr. 444; 2 Lead. Cas. Eq., 4th Am. ed., 1806; Proctor v. Ferebee, 1 Ired. Eq. 143; 36 Am. Dec. 34.

2 This legislation is, of course, confined to remedies which in some way

general types: 1. That by which the decree itself, without any act of the defendant or of an officer on his behalf, becomes a title, and vests a legal estate in the subject-matter in the plaintiff; 2. That by which a commissioner, master, or other officer of the court executes the decree, and through his conveyance or other official act transfers the legal estate from the defendant to the plaintiff, or otherwise vests the plaintiff with title. Both these types are often found in the statutes of the same state, and they are subject to minor modifications, as shown by the footnote, which contains a list of the states and of the statutes. In all cases where an instrument is directed to be executed by an officer, the statutes provide that it shall have exactly the same effect as if executed by the party himself. These statutes do not generally interfere with the original power of courts of equity to enforce obedience to their decrees

relate to or deal with title or estates, legal or equitable, in specific property. The most important modifications referred to in the text are the following: In some statutes of the first type the language is positive and peremptory that the decree shall operate to transfer the title, etc.; in others it is permissive, — the court may provide in the decree that it shall operate to transfer the title in case the defendant neglects or refuses to obey its mandates. Similar variations are found in the statutes of the second type. The following are the most important of these statutes:—

Alabama: Code 1876, p. 848, secs. 3899 (3469).

Arkansas: Gantt's Dig. of Stats. 1874, p. 675, secs. 3640, 3641; p. 836, secs. 4783, 4785, 4787.

Connecticut: Pub. Acts 1875, p. 63, c. 97, sec. 26.

Delaware: Rev. Stats. 1874, p. 571, c. 95, sec. 12.

Georgia: Code 1882, p. 1106, sec. 4209 (4150).

Illinois: Hurd's Rev. Stats. 1880, p. 191, c. 22, secs. 46, 47.

Indiana: Davis's Rev. Stats. 1876, p. 237, secs. 542, 544, 549.

Iowa: 2 Miller's Rev. Code 1880, p. 722, secs. 2886, 2888.

Kansas: Dassler's Comp. Laws 1881, p. 654, art. 17, c. 80, sec. 400.

Kentucky: Bullitt's Codes 1876, p. 79, secs. 394, 396.

Louisiana: Code of Practice 1875, sec. 636.

Maine: Rev. Stats. 1871, p. 582, c. 77, sec. 7; c. 111, secs. 6, 7, 8.

Maryland: Rev. Code 1878, p. 643, art. 65, sec. 73.

Massachusetts: Pub. Stats. 1882, p. 797, c. 142, sec. 1.

Michigan: 2 Comp. Laws 1871, p. 1541, c. 176, sec. (5099) 63; pp. 1419–1421, c. 162, secs. (4530) 1, (4536) 7, (4538) 9, (4541) 12.

Minnesota: Young's Gen. Stats. 1878–80, p. 818, c. 75, sec. 32; p. 611, c. 58, secs. 1, 7.

by the parties themselves, and to punish such parties for their disobedience by attachment, fine, imprisonment, or sequestration. The operation of these statutes is confined to the territorial limits and jurisdiction of the states in which they are respectively enacted. It does not extend to decrees of the United States courts. The effect of equitable remedies granted and decrees rendered by the United States courts, in the absence of legislation by Congress, is governed by the original doctrine of equity; their decrees do not transfer title; they must be executed by the parties, and obedience is compelled by proceedings in the nature of punishment for contempt, attachment, or seques-

Mississippi: Rev. Code 1880, p. 535, c. 59, sec. 1954.

Missouri: 1 Rev. Stats. 1879, p. 464, secs. 2760, 2761.

Nebraska: Brown's Comp. Stats. 1881, p. 585, sec. 429 b; p. 587, sec. 451; pp. 249–251, secs. 323, 329, 331, 334.

New Hampshire: Gen. Laws 1878, p. 489, c. 209, sec. 9.

New Jersey: Rev. of Stats. 1877, p. 115, sec. 63.

New York: Code Civ. Proc. (new code), sec. 718.

North Carolina: Tourgee's Code Civ. Proc. 1878, sec. 215.

Ohio: Seney's Code Civ. Proc. 1874, secs. 375, 395; Rev. Stats. 1879, secs. 5318, 5399.

Oregon: Gen. Laws 1874; Code Civ. Proc., sec. 402.

Tennessee: 2 Stats. 1871 (Thompson and Steger's ed., 1872), secs. 4478, 4484, 4485, 4486, 4487, 4488.

Texas: Rev. Stats. 1879, p. 210, art. 1338.

Vermont: Rev. Laws 1880, p. 204, c. 43, secs. 766–770.

Virginia: Code 1873, p. 1164, c. 182, sec. 1.

West Virginia: Kelly's Rev. Stats. 1878, p. 929, c. 163, sec. 1; c. 22, sec. 1.

The following cases illustrate the provision that the decree itself is *a title*, or operates to transfer the title: King v. Bill, 28 Conn. 593; Price v. Sisson, 13 N. J. Eq. 168; Griffith v. Phillips, 3 Grant Cas. 381; Young v. Frost, 1 Md. 377, 403; Taylor v. Boyd, 3 Ohio, 337; 17 Am. Dec. 603; Randall v. Pryor, 4 Ohio, 424; Penn v. Hayward, 14 Ohio St. 302; Battle v. Bering, 7 Yerg. 529; 27 Am. Dec. 526; Gitt v. Watson, 18 Mo. 274; Hoffman v. Stigers, 28 Iowa, 302.

Whenever the decree itself thus operates to transfer title, a reversal of the decree on appeal necessarily destroys this effect *as between the parties themselves*, divests the title from the party to whom it had been transferred, and revests it in the party from whom it had passed. But if the decree had been executed by means of a conveyance, and the title had thus passed to a *bona fide* purchaser, before the appeal, a reversal may not divest him of the title or compel him to reconvey: See *ante*, Stats. of Delaware; Taylor v. Boyd, 3 Ohio, 337; 17 Am. Dec. 603. As to the time when the title passes by operation of the decree, whether from the date of the decree or by relation from the

tration.[3] There are, of course, classes of remedies to which this legislation cannot apply,— as, for example, decrees prohibiting any act, general pecuniary recoveries, analogous to money judgments at law, and many purely ancillary or provisional reliefs.

§ 1318. **Remedies in Personam beyond the Territorial Jurisdiction.**— The power to act *in personam,* through their remedies, is still held by all courts of equity, even in presence of the foregoing legislation. Of this nature must always be the remedies when the subject-matter, either real or personal property, is situated beyond the territorial jurisdiction of the court, in another state or country. The jurisdiction to grant such remedies is well settled. Where the subject-matter is situated within another state or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which *directly* affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted. As examples of this rule, suits for specific performance of contracts, for the enforcement of express or implied trusts, for relief on the ground of fraud, actual or constructive, for the final accounting and settlement of a partnership, and the like, may be brought in any state where jurisdiction of defendant's person is obtained, although the land or other subject-matter is situated in another state, or even in a foreign country.[1] On the other

date of the commencement of the suit, see Shotwell v. Lawson, 30 Miss. 27; 64 Am. Dec. 145; King v. Bill, 28 Conn. 593.

[3] This is so, although the property which is the subject-matter of the decree is situated within a state which has legislated in the manner above described: Watkins v. Holman, 16 Pet. 25, 26; Briggs v. French, 1 Sum. 504; Lyman v. Lyman, 2 Paine, 11, 13; Tardy v. Morgan, 3 McLean, 358; Massie v. Watts, 6 Cranch, 148; Shepherd v. Comm'rs of Ross Co., 7 Ohio, 271.

[1] This rule applies to the United States courts as well as to the state courts, and is also well settled in England: Penn v. Lord Baltimore, 1 Ves. Sr. 444;

hand, where the suit is strictly local, the subject-matter is specific property, and the relief when granted is such that it *must* act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated.[2]

2 Lead. Cas. Eq., 4th Am. ed., 1806; Caldwell v. Carrington's Heirs, 9 Pet. 86; Watkins v. Holman, 16 Pet. 25; Massie v. Watts, 6 Cranch, 148; Briggs v. French, 1 Sum. 504; Carrington's Heirs v. Brents, 1 McLean, 167; Watts v. Waddle, 1 McLean, 200; Tardy v. Morgan, 3 McLean, 358; Moore v. Jaeger, 2 McAr. 465; Wood v. Warner, 15 N. J. Eq. 81; Brown v. Desmond, 100 Mass. 267; Davis v. Parker, 14 Allen, 94; Pingree v. Coffin, 12 Gray, 288, 304; Gardner v. Ogden, 22 N. Y. 327, 332–339; 78 Am. Dec. 192; Newton v. Bronson, 13 N. Y. 587; 67 Am. Dec. 89; Bailey v. Ryder, 10 N. Y. 363; De Klyn v. Watkins, 3 Sand. Ch. 185; Cleveland v. Burrill, 25 Barb. 532; Sutphen v. Fowler, 9 Paige, 280; Hawley v. James, 7 Paige, 213; 32 Am. Dec. 623; Mead v. Merritt, 2 Paige, 402; Dickinson v. Hoomes's Adm'r, 8 Gratt. 353; Moore v. Hood, 9 Rich. Eq. 311; 70 Am. Dec. 210; Ross v. Southwestern R. R. Co., 53 Ga. 514; Guild v. Guild, 16 Ala. 121; Topp v. White, 12 Heisk. 165; Penn v. Hayward, 14 Ohio St. 302; Henry v. Doctor, 9 Ohio, 49; Wills v. Cowper, 2 Ohio, 124; Olney v. Eaton, 66 Mo. 563.

2 For example, a suit to abate a nuisance, and, it seems, a suit to determine the title to specific land: Miss. & Mo. R. R. v. Ward, 2 Black, 485; North Ind. R. R. v. Mich. Cent. R. R., 15 How. 233; 5 McLean, 444; Massie v. Watts, 6 Cranch, 148. As to injunctions restraining threatened acts in another state, see Western Union Tel. Co. v. West. etc. R. R., 8 Baxt. 54; Atlantic etc. Tel. Co. v. Baltimore etc. R. R., 14 Jones & S. 377.

FIRST GROUP.

REMEDIES PURELY ANCILLARY AND PROVISIONAL.

CHAPTER FIRST.

INTERPLEADER.

ANALYSIS.

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§ 1319. Description of This Group.— The distinguishing characteristic of the remedies belonging to this group is, that they determine no primary rights, and grant no final reliefs, either directly or indirectly. They are, in fact, instruments and means by which the court is enabled more conveniently and perfectly to adjudicate upon the *ultimate* rights and interests of the parties, and to award the *final* reliefs, in the further judicial proceedings to which they are auxiliary, and of which they are really the preliminary stage. These remedies are therefore, in every sense of the terms, ancillary and provisional.

§ 1320. Interpleader — General Nature and Object.— I purpose in this chapter to describe the general equitable jurisdiction to grant the remedy of interpleader independent of statute; and afterwards to notice briefly the modern stat-

utes, some of which may perhaps have enlarged that jurisdiction, but most of which have simply conferred a similar jurisdiction upon courts of law, to be exercised in certain kinds of legal actions.[1] Where two or more persons, whose titles are connected by reason of one being derived from the other, or of both being derived from a common source, claim the same thing, debt, or duty, by different or separate interests, from a third person, and he, not knowing to which of the claimants he ought of right to render the debt or duty, or to deliver the thing, fears he may be hurt by some of them, he may maintain a suit and obtain against them the remedy of interpleader. In his bill of complaint he must state his own rights and their several claims, and pray that they may interplead, so that the court may adjudge to whom the thing, debt, or duty belongs, and he may be indemnified. If any suits at law have been brought against him, he may also pray that such proceedings be restrained until the right be determined.[2] The object of

[1] Under the ancient common law, the relief of interpleader was allowed in two special cases in a legal action by a court of law: when two or more persons had made a joint bailment and then brought separate actions of detinue against the depositary for the thing bailed; and when the thing came into the holder's possession by finding, and two or more persons claiming to be owners sued him in separate actions of detinue. Modern statutes, English and American, have enabled courts of law to grant a similar relief, in a summary manner, in certain legal actions, but this legislation has no connection with the ancient common-law jurisdiction above mentioned. For a more full account of this common-law relief, see Mitford's Eq. Pl., Jeremy's ed., 141, 142; Crawshay v. Thornton, 2 Mylne & C. 1.

[2] This description is taken, with some additions and alterations to conform to later decisions, from Mitford's Equity Pleading, 58, 59. As to the general nature of the remedy, see Crawshay v. Thornton, 2 Mylne & C. 1; Sieveking v. Behrens, 2 Mylne & C. 581; Glyn v. Duesbury, 11 Sim. 139, 147; Langston v. Boylston, 2 Ves. 101, 103, 109; Jones v. Thomas, 2 Smale & G. 186; Prudential Ass. Co. v. Thomas, L. R. 3 Ch. 74; Farley v. Blood, 30 N. H. 354; Lincoln v. Rutland etc. R. R., 24 Vt. 639; Dorn v. Fox, 61 N. Y. 264; Shaw v. Coster, 8 Paige, 339; 35 Am. Dec. 690; Mohawk etc. R. R. v. Clute, 4 Paige, 384; Bedell v. Hoffman, 2 Paige, 199; Badeau v. Rogers, 2 Paige, 209; Bell v. Hunt, 3 Barb. Ch. 391; Richards v. Salter, 6 Johns. Ch. 445; Atkinson v. Manks, 1 Cow. 691; Cady v. Potter, 55 Barb. 463; Mount Holly etc. Tp. Co. v. Ferree, 17 N. J. Eq. 117; Strange v. Bell, 11 Ga. 103; Burton v. Black, 32 Ga. 53; Hayes v. Johnson, 4 Ala. 267; Michigan etc. Co. v. White, 44

the suit is, that the conflicting claimants shall litigate the matter among themselves, without involving the stakeholder in their controversy, with which he has no interest. It is plain, therefore, that the plaintiff can obtain no *specific* relief. So far as he is concerned, upon his filing the bill, and surrendering up the thing or money into the custody of the court, *his* remedy is exhausted by the decree that the defendants do interplead with each other, and that he be freed from or indemnified against their demands, and that he recover his costs; with the result of their dispute he has no concern. The ground of the jurisdiction is

Mich. 25; Cogswell v. Armstrong, 77 Ill. 139; Hathaway v. Foy, 40 Mo. 540; Orr Water Ditch Co. v. Larcombe, 14 Nev. 53; Pfister v. Wade, 56 Cal. 43.

Rationale of the Remedy. — It is sometimes supposed that the remedy of interpleader is allowed to avoid the risk of two recoveries. This is entirely a mistaken view. If a party has in any way made himself liable, even for the same demand, to two claimants, he is not entitled to an interpleader. It is the essential fact that he should actually be liable to only one of the claimants. The true *rationale* of interpleader is, that the party thereby avoids the risk of being vexed by two or more suits. Even though there is no danger of his being compelled to pay the same demand twice, the danger of two suits against him, with the consequent trouble and expense, is the sufficient ground for the remedy: Crawford v. Fisher, 1 Hare, 436, 441; East and West India Dock Co. v. Littledale, 7 Hare, 57, 60; Langston v. Boylston, 2 Ves. 101; Sablicich v. Russell, L. R. 2 Eq. 441; Greene v. Mumford, 4 R. I. 313; School District v. Weston, 31 Mich. 85; Pfister v. Wade, 56 Cal. 43. In Crawford v. Fisher, Wigram, V. C., said: "The office of an interpleading suit is, not to protect a party against a *double liability*, but against double vexation in respect of *one* liability. If the circumstances of a case show that the plaintiff is liable to both claimants, that is no case for interpleader. It is of the essence of an interpleading suit that the plaintiff shall be liable to one only of the claimants; and the relief which the court affords him is against the vexation of two proceedings on a matter which may be settled in a single suit." The supreme object of an interpleader is to protect the plaintiff, — the stakeholder, — and not the claimants against him; to protect him from the danger and vexation of two opposing suits for the same demand by those claimants, while he is ready and willing to pay the demand to the one who is judicially ascertained to be entitled to it: Trigg v. Hitz, 17 Abb. Pr. 436; Farley v. Blood, 30 N. H. 354; Mich. etc. Co. v. White, 44 Mich. 25; Newhall v. Kastens, 70 Ill. 156; Nelson v. Barter, 2 Hem. & M. 334; 33 L. J. Ch. 705; 10 Jur., N. S., 832. Such danger must be real; a mere suspicion of risk will not be sufficient to support a bill: Blair v. Porter, 13 N. J. Eq. 267; and this danger must not only exist when the bill is filed, but must continue until the decree: Kerr v. Union Bank, 18 Md. 396.

plain. The party seeking the remedy is exposed to the hazard, vexation, and expense of several actions at law for the same demand, while he is ready and willing to satisfy that demand in favor of the claimant who establishes his right thereto. For this liability the law furnishes no adequate remedy, and in most instances no remedy whatever.

§ 1321. **The Claims, Legal or Equitable.**— The equitable jurisdiction exists, although both or all the conflicting claims against the stake-holder are legal,[1] since it depends upon the fact that distinct claims are made, rather than upon their intrinsic nature as being legal or equitable. It is not necessary, however, that all the claims should be legal; the remedy is granted when one of them is legal and the other equitable.[2] Indeed, if one or more of the conflict-

Such being the theory of the remedy, it is not essential that any suit should have been actually commenced by either claimant against the plaintiff: Angell v. Hadden, 15 Ves. 244; Morgan v. Marsack, 2 Mer. 107; Farley v. Blood, 30 N. H. 354; Richards v. Salter, 6 Johns. Ch. 445; Yates v. Tisdale, 3 Edw. Ch. 71; Schuyler v. Pelissier, 3 Edw. Ch. 191; Strange v. Bell, 11 Ga. 103; Gibson v. Goldthwaite, 7 Ala. 281; 42 Am. Dec. 592. It is enough that the conflicting claimants make their respective claims and threaten suit: Langston v. Boylston, *supra;* Providence Bank v. Wilkinson, 4 R. I. 507; 70 Am. Dec. 160; Briant v. Reed, 14 N. J. Eq. 271; Yarborough v. Thompson, 3 Smedes & M. 291; 41 Am. Dec. 626. The plaintiff must, however, positively allege an actual claim made by each defendant: State Ins. Co. v. Gennett, 2 Tenn. Ch. 82.

1 Lowndes v. Cornford, 18 Ves. 299.

2 Lowndes v. Cornford, *supra;* Morgan v. Marsack, 2 Mer. 107; Wright v. Ward, 4 Russ. 215; Paris v. Gilham, Coop. 56; Martinius v. Helmuth, 2 Ves. & B. 412; Smith v. Hammond, 6 Sim. 10; Crawford v. Fisher, 10 Sim. 479; Hamilton v. Marks, 5 De Gex & S. 638; Prudential Ass. Co. v. Thomas, L. R. 3 Ch. 74; Duke of Bolton v. Williams, 4 Brown Ch. 297, 309; Farley v. Blood, 30 N. H. 354; Richards v. Salter, 6 Johns. Ch. 445; Yates v. Tisdale, 3 Edw. Ch. 71; Schuyler v. Pelissier, 3 Edw. Ch. 191; Lozier's Ex'rs v. Van Saun's Adm'rs, 3 N. J. Eq. 325; Oil Run Petroleum Co. v. Gale, 6 W. Va. 525; Strange v. Bell, 11 Ga. 103; Burton v. Black, 32 Ga. 53; Gibson v. Goldthwaite, 7 Ala. 281; 42 Am. Dec. 592; Whitney v. Cowan, 55 Miss. 626, 647; Newhall v. Kastens, 70 Ill. 156. In England the necessity of a resort to equity is removed, although the equity jurisdiction is not at all affected, by the statute of 1 & 2 Wm. IV., c. 58, sec. 1, as amended and enlarged by the common-law procedure act (23 & 24 Vict., c. 126, sec. 12), which enabled a court of law, on motion, to direct what amounts to an interpleader in actions of debt, assumpsit, trover, and detinue. Under the present system of procedure, equitable claims may be

ing claims are purely equitable, there is the stronger reason for a resort to the equity jurisdiction; and prior to recent legislation in England and in the United States, such a resort was indispensable under those circumstances.

§ 1322. **Essential Elements.**— From the description given in a previous paragraph, and from the whole course of authorities, it is clear that the equitable remedy of interpleader, independent of recent statutory regulations, depends upon and requires the existence of the four following elements, which may be regarded as its essential conditions: 1. The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; 2. All their adverse titles or claims must be dependent, or be derived from a common source; 3. The person asking the relief — the plaintiff — must not have nor claim any interest in the subject-matter; 4. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stake-holder. As the original equitable jurisdiction is founded, to a great extent, upon these four propositions, I shall examine them separately.

§ 1323. **First. The Same Thing, Debt, or Duty.**— The same thing, debt, or duty must be claimed by both the parties against whom the interpleader is demanded.[1] This requi-

adjudicated upon in an interpleader issue connected with a legal action: Rusden v. Pope, L. R. 3 Ex. 269; Engelback v. Nixon, L. R. 10 Com. P. 645; Duncan v. Cashin, L. R. 10 Com. P. 554; Attenborough v. London and St. Katharine's Dock Co., L. R. 3 C. P. D. 450; see Langton v. Horton, 3 Beav. 464. Analogous statutes have been passed in many American states.

[1] Desborough v. Harris, 5 De Gex, M. & G. 439, 455. In Glyn v. Duesbury, 11 Sim. 139, 148, Shadwell, V. C., said: "*Where the claims made by the defendants are of different amounts, they can never be identical;* but where they are the same in amount, that circumstance goes far to determine their identity. The amount, however, may not be sufficient of itself to determine the identity; for the amount may be the same and the debt may be different." This *dictum* was approved in Pfister v. Wade, 56 Cal. 43. In my opinion, however, that portion of the *dictum* which is italicized — the statement that claims of different amounts can never be identical — is incorrect; it seems alike opposed to principle and to authority. Where both defendants claim one, single,

site results from the very nature and object of the remedy. If the subject in dispute has a bodily existence,— is a *thing*, — there can be no doubt nor question as to the identity. The difficulty in applying the rule arises where the subject is a chose in action; and then the identity must be determined in each particular case, not by any general rules, but by the nature, constitution, and incidents of the debt, demand, or duty itself.

undivided *debt*, technically so called, the statement is undoubtedly true; a difference in their amounts would be fatal to their identity. But it is clearly not necessarily so where the claims are for unliquidated damages. Where, for example, a chattel is in the plaintiff's hands, to which both defendants claim title, they do not sue to recover the article itself, but allege a *technical* conversion, and seek to recover damages,— the value of the chattel. Here the claim of the defendants would not be for a "thing," nor for a "debt," but it would be for a "duty,"— a *chose in action*. If each defendant alleged a different value, and claimed a different amount of damages, the *duty* asserted would still be identically the same in each demand. Another instance of difference in the amounts claimed by the different defendants, where the debt or duty may still be the same, occurs in cases where a fund being in plaintiff's hands, the whole of it is claimed by one defendant, and parts of it are claimed by the others. With regard to such cases, Christiancy, J., said, in School District v. Weston, 31 Mich. 85: "Upon the great weight of authority, both English and American, a much more liberal and reasonable rule has been established, and bills of interpleader have been frequently maintained, where the several claimants, instead of claiming the whole fund or matter in dispute, have claimed different portions of the fund, when the aggregate of all the claims exceeded the full amount of the fund; and the complainant being, as in the present case, virtually a stake-holder, and unable to determine to whom or in what proportions the payments should be made." In this case the plaintiff had let a contract for building a school-house for a specified sum to a contractor, and portions of this contract price were claimed by sub-contractors and material-men, the total amount of their claims exceeding the whole contract price. See also, as examples of such partial claims, Yates v. Tisdale, 3 Edw. Ch. 71; Fargo v. Arthur, 43 How. Pr. 193; Newhall v. Kastens, 70 Ill. 156; Board of Education v. Scoville, 13 Kan. 17. Where the same property had been taxed to the owner in two counties, in some cases for different amounts, in others for the same amount, a bill of interpleader by the owner to determine which of the counties was entitled to the tax has been maintained: See Thomson v. Ebbets, Hopk. Ch. 272; Mohawk etc. R. R. v. Clute, 4 Paige, 384, 391; Redfield v. Supervisors, Clarke Ch. 42; Dorn v. Fox, 61 N. Y. 264; but, *per contra*, see Greene v. Mumford, 4 R. I. 313. It is difficult to perceive how the tax levied by two different counties, even though the amount of each tax is the same, is one and the same debt or duty, so as to sustain a bill of interpleader.

§ 1324. Second. Privity between the Opposing Claimants. — A second requisite is, that the adverse titles of the claimants must be connected, or dependent, or one derived from the other, or both derived from a common source. It is not every instance of conflicting claims against a person for the same thing, debt, or duty which will entitle him to the remedy of an interpleader. Where there is no privity between the claimants, where their titles are independent, not derived from a common source, but each asserted as wholly paramount to the other, the stake-holder is obliged, in the language of the authorities, to defend himself as well as he can against each separate demand; a court of equity will not grant him an interpleader.[1]

Where a *chose in action* is the subject-matter, it is impossible to lay down any general rule by which its identity shall be determined. The circumstances of each case can alone disclose whether the same debt or duty is claimed by all the defendants: See City Bank v. Bangs, 2 Paige, 570; Briant v. Reed, 14 N. J. Eq. 271; Dodd v. Bellows, 29 N. J. Eq. 127; Leddel's Ex'r v. Starr, 20 N. J. Eq. 274; Salisbury Mills v. Townsend, 109 Mass. 115; Oil Run Petroleum Co. v. Gale, 6 W. Va. 525; Pfister v. Wade, 56 Cal. 43.

In other cases, one defendant claiming rent for certain premises, and the other claiming damages for their use and occupation, the demands were held not to be the same: Dodd v. Bellows, 29 N. J. Eq. 127; Johnson v. Atkinson, 3 Anstr. 798. If the conflicting claims relate to a specific "thing" in the plaintiff's possession, the identity is clear, and the value alleged is immaterial: Cady v. Potter, 55 Barb. 463. In Lozier's Ex'rs v. Van Saun's Adm'rs, 3 N. J. Eq. 325, a bill of interpleader was sustained, where the controversy was as to which of the defendants was entitled to receive payment of certain notes made by plaintiff's testator, although the amount to be paid was not ascertained; the amount, it was held, could not vary the rights of the claimants.

[1] Pearson v. Cardon, 2 Russ. & M. 606, 609–612; Crawshay v. Thornton, 2 Mylne & C. 1, 19–24; Nickolson v. Knowles, 5 Madd. 47; Cooper v. De Tastet, Tam. 177; Pfister v. Wade, 56 Cal. 43. This doctrine, which was left somewhat doubtful by the previous cases, was finally settled by the decision of Lord Brougham in Pearson v. Cardon, and of Lord Cottenham in Crawshay v. Thornton. It finds its most frequent application in cases of a tenant interpleading his landlord and a third person claiming under paramount title, of a bailee interpleading his bailor, and an adverse claimant asserting a paramount title, and of an agent interpleading his principal and an adverse paramount claimant. Examples of these cases are given in a subsequent paragraph.

Such being the doctrine, it is a manifest imperfection of the equity jurisdiction that it should be so limited. A person may be, and is, exposed to danger, vexation, and loss from conflicting *independent* claims to the same thing,

§ 1325. Third. Plaintiff a Mere Stake-holder.— The person seeking the relief must not have nor claim any interest in the subject-matter. He must occupy the position of a stake-holder. He must stand entirely indifferent between the conflicting claimants, and be ready and willing to surrender the entire thing in dispute, or to pay the entire debt, or render the entire duty, without any charge, deduction, or commission as against the one rightfully entitled. He cannot mingle up a demand of his own upon the property or fund, with the demand that the other persons shall interplead. As soon as the decree is made that the defendants

as well as from claims which are dependent; and there is certainly nothing in the nature of the remedy which need prevent it from being extended to both classes of demands. It is not surprising, therefore, that courts have sometimes ignored this doctrine in their decisions, or have been ready to admit exceptions to its operation. In the common-law procedure act of 1860, which provides for a summary interpleader by motion in legal actions, it was enacted that the order of interpleader may be made "though the titles of the claimants have not a common origin, but are adverse to and independent of each other." In Attenborough v. London etc. Dock Co., L. R. 3 C. P. D. 450, which was an interpleader proceeding in a legal action, the court of appeal held that the statute above quoted had abrogated this doctrine as laid down in Crawshay v. Thornton, at all events in the proceedings authorized by the statute. Bramwell, L. J., who was one of the commissioners who drew up the statute, said (p. 456): "From my own knowledge as one of the common-law commissioners, I can say that it was intended to do away with the effect of that decision." Baggallay, L. J., a very eminent equity lawyer, said (p. 458): "I may go further, and say that, in my opinion, if, after the common-law procedure act of 1860, a bill of interpleader had been filed, raising facts like those in Crawshay v. Thornton, any judge of the court of chancery would have felt himself no longer bound by the somewhat narrow principle laid down by Lord Cottenham, but would have acted upon the fuller powers contained in that statute." The Code of Civil Procedure of California, as lately amended, in section 386, goes even further, and provides for an interpleader, "although the titles or claims have not a common origin, *or are not identical.*" This last provision, that the claims need not be identical, is certainly unnecessary and most unreasonable; it violates the whole ground and reason upon which the remedy is based; if interpreted literally by the courts, it would remove almost every limitation upon this kind of suit, and render it a means of vexation and annoyance. There is no valid objection to the requisite that the opposing claims should be identical; the only question has been, What *is* such identity? Experience shows the danger of legislative intermeddling with doctrines long settled and approved by the consenting judgments of able courts.

do interplead, and that he be indemnified, the plaintiff must be wholly without the controversy.[1] The interest, however, which shall defeat the relief must be in the very *thing or fund* itself which is the subject-matter of the controversy and of the suit. An interest in the legal question at issue to be determined by the result of the litigation will not prejudice the plaintiff's right to the relief; nor, it seems, a charge, lien, or claim upon the very thing or

[1] Mitchell v. Hayne, 2 Sim. & St. 63; Langston v. Boylston, 2 Ves. 101; Moore v. Usher, 7 Sim. 383; Bignold v. Audland, 11 Sim. 23; Hoggart v. Cutts, Craig & P. 197; Lincoln v. Rutland etc. R. R., 24 Vt. 639; Atkinson v. Manks, 1 Cow. 691; Shaw v. Coster, 8 Paige, 339; 35 Am. Dec. 690; Lozier's Ex'rs v. Van Saun's Adm'rs, 3 N. J. Eq. 325; Kerr v. Union Bank, 18 Md. 396; Burton v. Black, 32 Ga. 53; Adams v. Dixon, 19 Ga. 513; 65 Am. Dec. 608; Anderson v. Wilkinson, 10 Smedes & M. 601; Cullen v. Dawson, 24 Minn. 66. While the plaintiff cannot set up a claim, charge, or lien upon the fund, which shall enter into the litigation, and form a part of the controversy: Wakeman v. Dickey, 19 Abb. Pr. 24; it seems this rule is not without exceptions. It does not apply where the claim is admitted by both defendants: Cotter v. Bank of England, 2 Dowl. Pr. 728; and see Attenborough v. London etc. Co., L. R. 3 C. P. D. 450; Gibson v. Goldthwaite, 7 Ala. 281; 42 Am. Dec. 592; Webster v. McDaniel, 2 Del. Ch. 297. If the plaintiff has a claim or charge on the fund, he may waive it, and maintain the suit: Jacobson v. Blackhurst, 2 Johns. & H. 486. It necessarily follows from the doctrine of the text that if the plaintiff expressly denies his liability in whole or in part to one of the defendants, he strikes at the very foundation of the remedy, and shows that he is not indifferent: Moore v. Usher, 7 Sim. 383; Greene v. Mumford, 4 R. I. 313; Patterson v. Perry, 14 How. Pr. 505; Cogswell v. Armstrong, 77 Ill. 139. As to the effect of a dispute or uncertainty with respect to the amount of the fund or debt for which plaintiff is liable, see City Bank v. Bangs, 2 Paige, 570; Consociated Pres. Soc. v. Staples, 23 Conn. 544; Chamberlain v. O'Connor, 1 E. D. Smith, 665; Bender v. Sherwood, 15 How. Pr. 258; Patterson v. Perry, 14 How. Pr. 505.

The stake-holder — the person in possession of the thing or fund, or from whom the debt or duty is owing, and against whom two or more conflicting claimants assert their demands — must necessarily be the plaintiff. No interpleader suit can be maintained by one of the contestants against the other contestant and the stake-holder: See Sprague v. West, 127 Mass. 471; Hyman v. Cameron, 46 Miss. 725; Hathaway v. Foy, 40 Mo. 540. Furthermore, the plaintiff must be in possession of the fund, or have it in his custody, so that he can deliver or pay it in pursuance of the decree. If he has already delivered the thing or paid the fund to one of the contestants, no suit for interpleader can be maintained: Mount Holly etc. Co. v. Ferree, 17 N. J. Eq. 117; Tiernan v. Rescaniere's Adm'rs, 10 Gill & J. 217; Vosburgh v. Huntington, 15 Abb. Pr. 254; Martin v. Maberry, 1 Dev. Eq. 169.

fund itself which is admitted to be valid by both the defendants. To sum up the doctrine, the plaintiff can only obtain the remedy of an interpleader; and the circumstances must be such that the entire rights of both defendants to the thing, fund, debt, or duty can be fully adjusted and determined in the one suit.[2]

§ 1326. **Fourth. No Independent Liability to One Claimant.**— The party seeking the relief must have incurred no independent liability to either of the claimants. Such an independent liability may be incurred in two classes of cases: 1. In the first place, the agent, depositary, bailee, or other party demanding an interpleader, in his dealings with one of the claimants, may have expressly acknowledged the latter's title, or may have bound himself by contract, so as to render himself liable upon such independent undertaking, without reference to his possible liability to the rival claimant upon the general nature of the entire transaction. Under these circumstances, as the plaintiff is liable at all events to one of the defendants, whatever may be their own respective claims upon the subject-matter as between themselves, he cannot call upon these defendants to interplead. He does not stand indifferent between the claimants, since one of them has a valid legal demand against him at all events.[1] Even if the acknowledgment or

[2] If, therefore, the plaintiff has, with respect to other property not the subject-matter of the present suit, an interest that one of the defendants shall succeed, because the decision thus made will be favorable to his own future litigation concerning that other property, — this is no objection to his maintaining a suit for an interpleader: Oppenheim v. Leo Wolf, 3 Sand. Ch. 571; McHenry v. Hazard, 45 Barb. 657; Gibson v. Goldthwaite, 7 Ala. 281; 42 Am. Dec. 592.

[1] Crawshay v. Thornton, 2 Mylne & C. 1, 19–24; Suart v. Welch, 4 Mylne & C. 305; Jew v. Wood, Craig & P. 185; Pfister v. Wade, 56 Cal. 43; Tyus v. Rust, 37 Ga. 574; 95 Am. Dec. 365; Hatfield v. McWhorter, 40 Ga. 269; Cullen v. Dawson, 24 Minn. 66. As to the effect produced by the English statute of 1860, interpreted by the decision in Attenborough v. London etc. Co., L. R. 3 C. P. D. 450, and the amendment of section 386 of the California Code of Civil Procedure, see *ante*, in note under § 1324. Another instance of the doctrine is, where the plaintiff, in stating the case in his bill, is obliged to admit himself to be a wrong-doer to either one of the defendants; he thus shows an

promise has been obtained by fraud or mistake, the right of the party thus deceived to be relieved in equity from his liability cannot be considered and sustained in an interpleader suit. 2. In the second class of cases, the independent liability of the plaintiff to one of the defendants arises from the very nature of the original relation subsisting between them, without reference to any collateral acknowledgment of title, or promise to be bound. The most important examples of such relations are those subsisting between a bailee and his bailor, an agent or attorney and his principal, a tenant and his landlord, and the like. In pursuance of the doctrine above stated, if a bailee is sued by his bailor, or an agent by his principal, or a tenant by his landlord, and at the same time a third person asserts a claim of title adverse and paramount to that of the bailor, principal, or landlord, a suit of interpleader cannot, in general, be maintained against the two conflicting claimants, since, from the very nature of the relation, there is an independent personal liability, with respect to the subject-matter, of the bailee to his bailor, of the agent to his principal, and of the tenant to his landlord.[2]

§ 1327. By Bailees, Agents, Tenants, and Parties to Contracts.— The general doctrine which determines the rights of bailees, agents, tenants, and contracting parties to interplead their principals, bailors, landlords, and the like, and claimants who assert antagonistic paramount titles, has

independent liability to that defendant, and is not entitled to an interpleader: Slingsby v. Boulton, 1 Ves. & B. 334; Morgan v. Fillmore, 18 Abb. Pr. 217; United States v. Vietor, 16 Abb. Pr. 153; Mount Holly etc. Co. v. Ferree, 17 N. J. Eq. 117; Dewey v. White, 65 N. C. 225; Hatfield v. McWhorter, 40 Ga. 269; Tyus v. Rust, 37 Ga. 574; 95 Am. Dec. 365. If the liability has been occasioned by some act of the plaintiff himself, he is not entitled to the remedy: See Desborough v. Harris, 5 De Gex, M. & G. 439, 455; Cochrane v. O'Brien, 2 Jones & L. 380.

2 For cases illustrating this conclusion, see the next following paragraph and notes thereunder. Since the cases of bailees, agents, and tenants are so important, and since the chief difficulties connected with the remedy of interpleader have arisen in its application to such persons, I have given a separate paragraph to the examination of these relations.

been stated in the preceding paragraph.[1] The rule is not, however, of universal application. There are cases in which a bailee, agent, or tenant may interplead his bailor, principal, or landlord, and a third person setting up an opposing claim to the thing, fund, or duty. These cases may be described by one general formula, as those in which the title of the opposing claimant is *derivative* under, and not antagonistic and paramount to, that of the bailor,

[1] I have collected and arranged in this note some of the most important cases which deal with such classes of persons.

Bailees and agents. — A bailee or agent cannot maintain an interpleader suit against the bailor or the principal and a third person who asserts an independent, antagonistic, and paramount title to the fund: Nickolson v. Knowles, 5 Madd. 47; Dixon v. Hamond, 2 Barn. & Ald. 310, 313; Cooper v. De Tastet, Tam. 177, 181, 182; Smith v. Hammond, 6 Sim. 10; Pearson v. Cardon, 2 Russ. & M. 606, 609, 610, 612; Crawshay v. Thornton, 2 Mylne & C. 1, 19–24; Cook v. Earl of Rosslyn, 1 Giff. 167; Atkinson v. Manks, 1 Cow. 691, 703–706; United States Trust Co. v. Wiley, 41 Barb. 477; Lund v. Seamen's Bank, 37 Barb. 129; United States v. Vietor, 16 Abb. Pr. 153; Vosburgh v. Huntington, 15 Abb. Pr. 254; First Nat. Bank v. Bininger, 26 N. J. Eq. 345; Tyus v. Rust, 37 Ga. 574; 95 Am. Dec. 365; Hatfield v. McWhorter, 40 Ga. 269; Crane v. Burntrager, 1 Ind. 165; White Water etc. Co. v. Comegys, 2 Ind. 469. Nor can an attorney maintain such a suit against his client and a third person who claims the money which he has collected, by an independent and antagonistic title: Marvin v. Ellwood, 11 Paige, 365; but see, *per contra*, Goddard v. Leech, Wright, 476. For the same reason, where A claims as legatee under a will, and B claims the property by a title paramount to that of the testator, the executor cannot compel them to interplead; he is under a direct liability to the legatee: Adams v. Dixon, 19 Ga. 513; 65 Am. Dec. 608. On the other hand, there are cases in which a bailee or an agent may interplead his bailor or his principal with third persons claiming adversely. Wherever the third person claims the thing, fund, debt, or duty from the bailee or agent under a title *derived from* the bailor or the principal, created by the latter's own act subsequently to the bailment or agency, — such as his assignment, agreement, sale, mortgage, trust, or lien given by him, — the bailee or agent may compel the parties to interplead. There is in such a case no denial of the original title; the only dispute is concerning the effect of the subsequent act, and as to which of the claimants is thereby entitled to the thing or fund. On this general ground an attorney may interplead his client and a person who sets up a derivative claim from such client: Gibson v. Goldthwaite, 7 Ala. 281; 42 Am. Dec. 592. And where money is in the hands of an agent, and the principal has created a lien or charge on the fund, in favor of a third person, in respect to which a controversy has arisen, the agent may compel his principal and the other claimant to interplead: Smith v. Hammond, 6 Sim. 10; Wright v. Ward, 4 Russ. 215–220. And where the principal has assigned the fund in the agent's hands, or the bailor has transferred his interest in the

principal, or landlord. An interpleader is allowed wherever the adverse claim originates from some act of the bailor, principal, or landlord, done or suffered after the commencement of the bailment, agency, or tenancy, and causing a dispute as to which of the parties is entitled to the thing, fund, or duty. The claim of the third person, instead of being under an independent, antagonistic, para-

thing bailed: Crawford v. Fisher, 1 Hare, 436, 440; Smith v. Hammond; Wright v. Ward; Tanner v. European Bank, L. R. 1 Ex. 261; Gibson v. Goldthwaite. For a like reason an interpleader is permitted where a bailor or principal has given orders for the property to two different persons who set up conflicting claims, since their titles are derivative, and not antagonistic: Pearson v. Cardon, 2 Russ. & M. 606; 4 Sim. 218; Atkinson v. Manks, 1 Cow. 691. The decision in Schuyler v. Pelissier, 3 Edw. Ch. 191, goes too far. An interpleader by the bailee is also allowed where a joint bailment has been made, or a transaction in the nature of a joint bailment, to await the happening of some event or the determination of some dispute: Suart v. Welch, 4 Mylne & C. 305; City Bank v. Skelton, 2 Blatchf. 14; First Nat. Bank v. West River R. R., 46 Vt. 633; Perkins v. Trippe, 40 Ga. 225. For special cases, see Mason v. Hamilton, 5 Sim. 19; Crellin v. Leyland, 6 Jur. 733. It should be remembered that in all such cases if the bailee or agent has recognized the title of the assignee or other holder of a derivative title, and has stipulated to hold the property at his disposal, the independent liability thus assumed will prevent the bailee or agent from compelling the assignee to interplead with the bailor or principal who repudiates the transaction: See *ante*, § 1326; Tyus v. Rust, 37 Ga. 574; 95 Am. Dec. 365; Hatfield v. McWhorter, 40 Ga. 269.

Tenant and landlord. — The general doctrine is familiar, that a tenant cannot deny his landlord's title; he cannot therefore maintain a suit for interpleader against his landlord and a stranger who claims under a title antagonistic and paramount to that of the lessor: Dungey v. Angove, 2 Ves. 304, 310; Woolaston v. Wright, 3 Anstr. 801; Smith v. Target, 2 Anstr. 529; Johnson v. Atkinson, 3 Anstr. 798; Cook v. Earl of Rosslyn, 1 Giff. 137; Crawshay v. Thornton, *supra;* Seaman v. Wright, 12 Abb. Pr. 304; Crane v. Burntrager, 1 Ind. 165; Snodgrass v. Butler, 54 Miss. 45. But the tenant is entitled to interplead his landlord and an opposing claimant whenever there is some privity between the two,— when the title of the other claimant is derivative from that of the lessor,— as, for example, when the relation of mortgagor and mortgagee, trustee and *cestui que trust*, assignor and assignee, etc., has been created between the two. In such a case the tenant does not dispute his landlord's title: Dungey v. Angove, 2 Ves. 304, 310, 312; Metcalf v. Hervey, 1 Ves. Sr. 248; Cowtan v. Williams, 9 Ves. 107; Clarke v. Byne, 13 Ves. 383; Johnson v. Atkinson, 3 Anstr. 798; Seaman v. Wright, 12 Abb. Pr. 304; Snodgrass v. Butler, 54 Miss. 45; Oil Run Petro. Co. v. Gale, 6 W. Va. 525. Or where both contestants claim under the lessor by different titles; for example, one as heir and the other as devisee: Jew v. Wood, 3 Beav. 579; Badeau v. Tylee, 1 Sand. Ch. 270.

mount title, must be made under a title *derived* from that of the bailor, principal, or landlord; it must acknowledge, and not deny, such original title.

§ 1328. Pleadings and Other Procedure.— The bill of complaint must contain allegations which show that all of the requisites entitling the plaintiff to the remedy exist in the case. It must allege positively that conflicting claims

Parties to contracts. — As a general rule, where A and B are bound by express contract, A cannot maintain an interpleader suit against B or a person holding or claiming under him, and a stranger who asserts and claims under an antagonistic and paramount title. A is under an independent liability to B: *Ante*, § 1326. For example, a vendee of real or personal property, with respect to his liability to pay the purchase price, cannot interplead his vendor and a third person claiming to own the property by an independent antagonistic title: James v. Pritchard, 7 Mees. & W. 216; Trigg v. Hitz, 17 Abb. Pr. 436; Shehan's Heirs v. Barnett's Heirs, 6 T. B. Mon. 592. On the other hand, as in cases of bailees, agents, and tenants, a party to a contract may interplead his co-contractor and other persons in privity with him, or distinct claimants all of whom are in privity with his co-contractor, — that is, may interplead his co-contractor and persons who derive their title under him, or several claimants all of whom thus hold by derivative title. As example: A vendee may interplead his vendor and an attaching creditor of A, alleged to be the real owner, the sale being alleged to have been really made by the vendor as A's agent: Richards v. Salter, 6 Johns. Ch. 445; Johnston v. Lewis, 4 Abb. Pr., N. S., 150. A vendor of land may interplead the husband of the deceased vendee and her heirs, where both claimed to be entitled to a conveyance: Farley v. Blood, 30 N. H. 354. Insurance companies may compel opposing claimants of the insurance money to interplead when they claim by assignment from the assured, or by mortgage, or by attachment, etc.,— that is, when they claim *derivatively:* Nelson v. Barter, 2 Hem. & M. 334; Hamilton v. Marks, 5 De Gex & S. 638; Spring v. S. C. Ins. Co., 8 Wheat. 268. On like ground, corporations may interplead opposing claimants of stock or dividends, whose titles are derivative from a stockholder, by assignment, execution, attachment, trust, etc.: Salisbury Mills v. Townsend, 109 Mass. 115; Providence Bank v. Wilkinson, 4 R. I. 507; 70 Am. Dec. 160; Cady v. Potter, 55 Barb. 463. See Cheever v. Hodgson, 9 Mo. App. 565. A maker of a note may compel claimants holding under the payee by derivative title to interplead; for example, an attaching creditor of payee and an assignee: Briant v. Reed, 14 N. J. Eq. 271; Bryan v. Saltenstall, 3 J. J. Marsh. 672; Fahie v. Lindsay, 8 Or. 474. The administrator of a deceased guardian to whom the note was made payable, and a new guardian appointed in place of the one deceased: Van Buskirk v. Roy, 8 How. Pr. 425. A receiver has been held entitled to interplead opposing claimants of the fund in his hands: Winfield v. Bacon, 24 Barb. 154. (*Quære*, would not the court direct the proper distribution of the fund by the receiver?) Where suits by persons claiming to be owners of the cargo are instituted in admiralty against a ship, caus-

to substantially the same thing, fund, debt, or duty are set up by the defendants; that plaintiff claims no interest in the subject-matter; that he is indifferent between the claimants, and is ready and willing to deliver the thing or fund, or pay the debt, or render the duty to the rightful claimant, but that he is ignorant or in doubt which is the rightful one, and is in a real danger or hazard by means of such doubt, from their conflicting demands.[1] The bill need not show an apparent title in either of the defendants.[2] On the contrary, if the bill should show that plaintiff was fully informed of the defendants' rights and of his own liability, or if it should show that one of the defendants was certainly entitled, on the facts alleged, to the thing, debt, or duty, in either case it would be demurrable; there would be no ground for an interpleader.[3] It is the

ing her arrest, the master cannot maintain interpleader against these claimants, because, — 1. The claims are not against him, but against the ship; and 2. The court of admiralty has full jurisdiction to settle all the questions: Sablicich v. Russell, L. R. 2 Eq. 441. Independently of statute, it has generally been held that a sheriff levying on goods by execution against A, which are claimed by B to be his property, cannot compel the execution creditor and B to interplead: Slingsby v. Boulton, 1 Ves. & B. 334; Shaw v. Coster, 8 Paige, 339; 35 Am. Dec. 690; Quinn v. Green, 1 Ired. Eq. 229; 36 Am. Dec. 46; Quinn v. Patton, 2 Ired. Eq. 48; Dewey v. White, 65 N. C. 225. Nor can the sheriff compel the opposing claimants of a surplus in his hands after satisfying an execution to interplead; such claims can be adjusted by the court: Parker v. Barker, 42 N. H. 78; 77 Am. Dec. 789; McDonald v. Allen, 37 Wis. 108; 19 Am. Rep. 754. But see Kring v. Green's Ex'rs, 10 Mo. 195; Lawson v. Jordan, 19 Ark. 297; 70 Am. Dec. 596. Statutes in England and in many of the states have authorized the sheriff to interplead the claimants of property seized by him under process.

1 Farley v. Blood, 30 N. H. 354; Parker v. Barker, 42 N. H. 78; 77 Am. Dec. 789; Atkinson v. Manks, 1 Cow. 691; Wilson v. Duncan, 11 Abb. Pr. 3; Lozier's Ex'rs v. Van Saun's Adm'rs, 3 N. J. Eq. 325; Briant v. Reed, 14 N. J. Eq. 271; Snodgrass v. Butler, 54 Miss. 45; Starling v. Brown, 7 Bush, 164; State Ins. Co. v. Gennett, 2 Tenn. Ch. 82; Pfister v. Wade, 56 Cal. 43.

2 East & W. Ind. Dock Co. v. Littledale, 7 Hare, 57; Pfister v. Wade, *supra*.

3 Parker v. Barker, 42 N. H. 78; 77 Am. Dec. 789; Mohawk etc. R. R. v. Clute, 4 Paige, 384; Morgan v. Fillmore, 18 Abb. Pr. 217; Wilson v. Duncan, 11 Abb. Pr. 3; Briant v. Reed, 14 N. J. Eq. 271; Barker v. Swain, 4 Jones Eq. 220. And if the plaintiff denies his liability to either of the defendants, he is not entitled to the remedy; he destroys the very foundation on which it rests: McHenry v. Hazard, 45 Barb. 657; 45 N. Y. 580. If the bill is taken

settled practice that the bill of complaint must be accompanied by an affidavit of the plaintiff, stating that the suit is not brought in collusion with either of the defendants; and the omission of such affidavit may generally be taken advantage of by demurrer.[4] The plaintiff must also bring or pay, or offer to bring or pay, the entire thing, fund, or money in controversy into court; an omission to do so renders the bill demurrable.[5] If the bill was properly filed, and if the plaintiff has acted in good faith, he is generally entitled to his costs out of the fund in controversy, which costs, as between the defendants, must ultimately be paid by the unsuccessful party.[6]

as confessed by one of the conflicting defendants, the fund indisputably belongs to the other. And where in such a case a stranger was afterwards admitted by the lower court, on petition, to contest the interest of the remaining defendant, it was held on appeal that there was no practice allowing a third person thus to come into the cause by petition; that the bill could not be amended to reach him, as it was filed to guard against *known* claims; the order that the remaining defendant and the third person should interplead was irregular: Michigan etc. Co. v. White, 44 Mich. 25. (*Quære*, would such a proceeding be allowed under the provision of the Iowa and California codes permitting *Intervention*?

[4] Hamilton v. Marks, 5 De Gex & S. 638; Farley v. Blood, 30 N. H. 354; Atkinson v. Manks, 1 Cow. 691; Beck v. Stephani, 9 How. Pr. 193; Mount Holly etc. Co. v. Ferree, 17 N. J. Eq. 117; Tyus v. Rust, 37 Ga. 574; 95 Am. Dec. 365; Snodgrass v. Butler, 54 Miss. 45; Starling v. Brown, 7 Bush, 164; Biggs v. Kouns, 7 Dana, 405, 411; but a contrary practice seems to prevail in Connecticut: Consociated Pres. Soc. v. Staples, 23 Conn. 544, 555; Nash v. Smith, 6 Conn. 421. The plaintiff's affidavit is conclusive; defendants cannot contradict it, even though the plaintiff has filed supplemental affidavits: Manby v. Robinson, L. R. 4 Ch. 347; Langston v. Boylston, 2 Ves. 101; Stevenson v. Anderson, 2 Ves. & B. 407; and see Fahie v. Lindsay, 8 Or. 474. If collusion appears on the face of the bill, relief will, of course, be denied: Marvin v. Ellwood, 11 Paige, 365; Kerr v. Union Bank, 18 Md. 396; Williams v. Halbert, 7 B. Mon. 184.

[5] The whole fund must be put at the disposal of the court; an offer to bring in what may be found due is not sufficient: Mohawk etc. R. R. v. Clute, 4 Paige, 384; Atkinson v. Manks, 1 Cow. 691; Williams v. Walker, 2 Rich. Eq. 291; 46 Am. Dec. 53; Snodgrass v. Butler, 54 Miss. 45; McGarrah v. Prather, 1 Blackf. 299; Starling v. Brown, 7 Bush, 164. It was held in Farley v. Blood, 30 N. H. 354, that in a suit concerning the defendants' rights to a conveyance under a land contract, the plaintiff must offer to convey, and must have the deeds executed ready for delivery.

[6] See Laing v. Zeden, L. R. 9 Ch. 736; Aldridge v. Thompson, 2 Brown Ch.

§ 1329. Interpleader in Legal Actions.— In England and in many of the American states a summary mode of interpleader by motion and order in certain legal actions is authorized.[1] These statutes substantially provide that in actions specified the defendant may show by affidavit that the same thing or money is claimed by another person besides the plaintiff; that he has sued or threatens to sue; that defendant is not in collusion with him; and that defendant is ready and willing to bring the thing or money into court. The court on motion may order such claimant to be substituted as defendant in the action in place of the original defendant. It is universally held that these statutes do not at all limit nor affect the equitable jurisdiction by suit; they merely furnish another special, cumulative,

149; Farley v. Blood, 30 N. H. 354; Manchester Print Works v. Stimson, 2 R. I. 415; Atkinson v. Manks, 1 Cow. 691; Canfield v. Morgan, Hopk. Ch. 224; Aymer v. Gault, 2 Paige, 284; Badeau v. Rogers, 2 Paige, 209; Spring v. S. C. Ins. Co., 8 Wheat. 268. As in all equity suits, costs are within the discretion of the court, and depend somewhat upon the circumstances of each case.

[1] The English statute of 1 & 2 Wm. IV., c. 58, sec. 1, allowed this proceeding in actions of assumpsit, debt, trover, and detinue. For the amendment made by the common-law procedure act of 1860, see *ante*, note under § 1324. The American statutes mainly differ with respect to the kinds of actions in which the proceeding is allowed. In a few states it is confined to actions on contract for money: *Alabama:* Code 1876, secs. 2906, 2907; or to actions for the recovery of personal property: *Arkansas:* Code 1874, secs. 4483, 4484; *Iowa:* 2 McClain's Stats. 1880, sec. 2572; *Oregon:* Gen. Laws 1872, p. 111, sec. 39. In several states the proceeding is allowed in actions on contract, and in those for the recovery of specific personal property: *California:* Code Civ. Proc., sec. 386 (for recent amendment, see *ante*, note under § 1324); *Idaho:* Gen. Laws 1880–81, sec. 201; *Kansas:* Dassler's Comp. Laws 1881, secs. 3564, 3565; *Nebraska:* Brown's Comp. Stats. 1881, pp. 535, 536, sec. 48; *Ohio:* 2 Rev. Stats. 1880, secs. 5016, 5017; *Mississippi:* Rev. Code 1880, sec. 1578. In others it embraces actions on contract, and actions for the recovery of real or of personal property: *Dakota:* Rev. Codes 1877, p. 491, sec. 91; *Minnesota:* Stats. 1878, p. 725, sec. 131; *New York:* Code Civ. Proc. (new code), sec. 820; *North Carolina:* Battle's Rev. 1873, p. 156, sec. 65; *South Carolina:* Rev. Stats. 1873, p. 597, sec. 145. In two states it is authorized "in any action": *Virginia:* Code 1873, c. 149, p. 1019; *West Virginia:* 1 Kelly's Rev. Stats. 1879, c. 7, p. 238. In some other states a similar proceeding is authorized by statute in certain special cases: *Colorado:* King's Code Civ. Proc. 1880, p. 151, sec. 404.

and concurrent remedy. The ordinary type of these statutes does not alter the settled doctrines concerning interpleader. The statutory remedy is a mere substitute for the equitable remedy by suit, in the kinds of actions to which it applies, and is governed by the same rules.[2] Of course, the statutes may change the equitable doctrines; may enlarge their scope of operation; and a few of them have doubtless produced this effect, as in the clauses introduced by amendment into the statutes of England and California, already noticed.[3]

2 Oriental Bank v. Nicholson, 3 Jur., N. S., 857; Slaney v. Sidney, 14 Mees. & W. 800; Tauton v. Groh, 4 Abb. App. 358; Vosburgh v. Huntington, 15 Abb. Pr. 254; Johnson v. Maxey, 43 Ala. 521; Nelson v. Goree's Adm'r, 34 Ala. 565; Starling v. Brown, 7 Bush, 164; Board of Education v. Scoville, 13 Kan. 17; Pfister v. Wade, 56 Cal. 43.

3 See *ante*, note under § 1324; Tanner v. European Bank, L. R. 1 Ex. 261. As to actions under codes of procedure adopting the reformed procedure, see Cady v. Potter, 55 Barb. 463; Washington etc. Ins. Co. v. Lawrence, 28 How. Pr. 435; St. Louis Life Ins. Co. v. Alliance Mut. L. Ins. Co., 23 Minn. 7; Board of Education v. Scoville, 13 Kan. 17; Pfister v. Wade, 56 Cal. 43. In volume 35 of the American Decisions, pp. 695–712, the reader will find a very able, exhaustive, and instructive note to the case of Shaw v. Coster, which discusses many points of practice, and questions arising under the statutes, which I have not touched upon. I have availed myself of the assistance furnished by this note in preparing the foregoing chapter, especially in its exhaustive collection of cases.

CHAPTER SECOND.

RECEIVERS.

ANALYSIS.

§ 1330. Definition, general nature, and objects.
§ 1331. The appointment discretionary.
§§ 1332–1335. Cases in which a receiver may be appointed.
§ 1332. First class.
§ 1333. Second class.
§ 1334. Third class.
§ 1335. Fourth class.
§ 1336. Their powers, rights, duties, and liabilities.

§ 1330. **General Nature and Objects.**— I purpose in this chapter to give a mere sketch of the general doctrines concerning this peculiar subject.[1] A receiver is a person standing indifferent between the parties, appointed by the court as a *quasi* officer or representative of the court, to hold, manage, control, and deal with the property which is the subject-matter of or involved in the controversy, under the direction of the court, during the continuance of the litigation, either where there is no person entitled competent to thus hold it,— as, for example, in the case of an infant, or in the interval before an executor or administrator of a deceased owner is appointed; or where two or more litigants are equally entitled, but it is not just and proper that either of them should retain it under his control,— as, for example, in some suits between partners; or where a person is legally entitled, but there is danger of his misapplying or misusing it,— as, for example, in some

[1] The subject of receivers has come to be one of great importance, owing especially to its vastly increased application of late in the winding up of corporations both in England and in this country. The remedy is so peculiar, and the rules regulating it in all its phases and applications are so special, that my limits of time and space will only permit a meager statement of its most general doctrines. The reader must be referred, for practical assistance in his professional work, to those treatises which deal with the subject in an exhaustive manner, of which Mr. Kerr's work is certainly one of the best.

suits against an executor or administrator, or, under some particular circumstances, in suits for the enforcement of a mortgage; or he is appointed in like manner and under like circumstances for the purpose of carrying into effect a decree of the court concerning the property,— as, for example, a decree for the winding up and settlement of a corporation, or the decree in a creditor's suit.[2]

§ 1331. The Appointment Discretionary.—The appointment of a receiver is, as a general rule, discretionary.[1] The discretion is not arbitrary or absolute; it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of promoting the ends of justice, and of protecting the rights of *all* the parties interested in the controversy and the subject-matter, and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding. One of the most material circumstances, without which the court would hardly make the appointment, is the reasonable probability that the plaintiff asking for a receiver will ultimately succeed in obtaining the general relief sought for by his suit.[2]

§ 1330, [2] Kerr on Receivers, 1, 2; Owen v. Homan, 3 Macn. & G. 378, 412; Bainbrigge v. Baddeley, 3 Macn. & G. 413, 419; Sturch v. Young, 5 Beav. 557; Ladd v. Harvey, 21 N. H. 514; Cheever v. Rutland etc. R. R., 39 Vt. 653; Bank of Miss. v. Duncan, 52 Miss. 740; Battle v. Davis, 66 N. C. 252; Twitty v. Logan, 80 N. C. 69; Crowder v. Moone, 52 Ala. 220 (not until the bill is filed); Delaware etc. R. R. v. Erie R. R., 21 N. J. Eq. 298; Blondheim v. Moore, 11 Md. 365; Haight v. Burr, 19 Md. 130; Voshell v. Hynson, 26 Md. 83; Beverley v. Brooke, 4 Gratt. 187, 208; Hand v. Dexter, 41 Ga. 454; Reid v. Reid, 38 Ga. 24; Dougherty v. McDougald, 10 Ga. 121; Mapes v. Scott, 4 Ill. App. 268; Richards v. Barrett, 5 Ill. App. 510; Baker v. Backus's Adm'r, 32 Ill. 79; Mays v. Wherry, 3 Tenn. Ch. 34; Cassetty v. Capps, 3 Tenn. Ch. 524; French v. Gifford, 30 Iowa, 148; Brown v. Home Sav. Bank, 5 Mo. App. 1; La Société Française v. District Court, 53 Cal. 495; Libby v. Rosekrans, 55 Barb. 202; Booth v. Clark, 17 How. 322, 331; Crane v. McCoy, 1 Bond, 422; Whelpley v. Erie R'y, 6 Blatchf. 271; Wilmer v. Atlanta etc. R'y, 2 Woods, 409.

§ 1331, [1] The discretion is not so absolute that it may not be reviewed, and its exercise, if improper, reversed: La Société Française v. Dist. Court, 53 Cal. 495; Milwaukee etc. R. R. v. Soutter, 2 Wall. 521.

§ 1331, [2] In Owen v. Homan, 3 Macn. & G. 378, 412, affirmed 4 H. L. Cas.

§ 1332. **Cases in Which a Receiver may be Appointed.**— As stated in a previous paragraph, the cases in which a receiver may be appointed, subject to the general rules regulating the exercise of the judicial discretion, may be reduced to four general classes. The first class contains those cases where there is no person entitled to the property who is at the same time competent to hold and manage it during the judicial proceeding. In instances of this class a receiver is appointed more readily and without proof of imminent danger, perhaps, than in any other. It includes, — 1. Infants' estates.[1] A court of equity exercises control

997, the court said: "It is unnecessary to do more than to state that the granting a receiver is a matter of discretion to be governed by a view of the whole circumstances of the case; one most material of which circumstances is the probability of the plaintiff being ultimately entitled to a decree." In Bainbrigge v. Baddeley, 3 Macn. & G. 413, 419, the court, speaking of the general grounds for the appointment of a receiver, said: "There are, I apprehend, two grounds, and two only: 1. That there is a reasonable probability of success on the part of the plaintiff; and 2. That the property, the subject of the suit, is in danger." In Blondheim v. Moore, 11 Md. 365, the following rules controlling the exercise of the discretion were laid down, which have been frequently quoted as a correct generalization: "1. That the power of appointment is a delicate one, and is to be exercised with great circumspection; 2. That it must appear the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property; 3. That there is no case in which the court appoints a receiver merely because the measure can do no harm; 4. That fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved; and 5. That unless the necessity be of the most stringent character, the court will not appoint a receiver until the defendant is first heard in response to the application." These rules, however, must be taken with some reservations; they are certainly too strong to be of universal application, especially the fourth. There are classes of cases in which a receiver is appointed almost as a matter of course, although no fraud nor *imminent* danger is proved. See, on the general matter of discretion, Earl Talbot v. Hope Scott, 4 Kay & J. 96; Whitworth v. Whyddon, 2 Macn. & G. 52, 55; Evans v. Coventry, 5 De Gex, M. & G. 911, 916, 917; Skip v. Harwood, 3 Atk. 564; Battle v. Davis, 66 N. C. 252; Hand v. Dexter, 41 Ga. 454; Crawford v. Ross, 39 Ga. 44; Crane v. McCoy, 1 Bond, 422; Nichols v. Perry Pat. Arm Co., 11 N. J. Eq. 126; Ladd v. Harvey, 21 N. H. 514; Orphan Asylum v. McCartee, Hopk. Ch. 429; Maynard v. Railey, 2 Nev. 313; Bank of Miss. v. Duncan, 52 Miss. 740.

[1] Gardner v. Blane, 1 Hare, 381; Butler v. Freeman, Amb. 301, 303; Duke of Beaufort v. Berty, 1 P. Wms. 703. The main reason for appointing a receiver, in the absence of a trustee, was that the guardian at common law

over the property of its infant ward, where there is no trustee, by means of a receiver, even though there is a guardian. 2. Lunatics' estates. The control of the court over the property of a lunatic is ordinarily exercised by means of a committee; but instead of a committee, and especially where no person will act as a committee, the court may appoint a receiver.[2] 3. Estates of decedents. During the litigation concerning the admission of a will to probate, and during the interval before an executor or administrator is appointed, a court of equity has power to appoint a receiver of the personal property and of the rents and profits of the real estate, where there is any danger of their loss, misuse, or misapplication. The necessity of such a receiver has been greatly lessened by modern statutes authorizing the probate court to appoint an administrator *ad litem,* and enlarging his powers.[3]

had not full power of control and management. The necessity of a receiver in such cases may have been obviated in many states by statutes enlarging the powers of guardians.

[2] See *ante,* § 1312, cases as to appointment of committees. A receiver will not be appointed after the death of a lunatic, during a controversy between persons claiming to be his heirs: In re Ferrior, L. R. 3 Ch. 175, 719. Where a suit was brought by the committee of a lunatic to set aside a conveyance of land alleged to have been obtained by defendant from the lunatic by fraud, undue influence, and defendant was in possession receiving the rents and profits, and was alleged to be insolvent, the appointment of a receiver of the property during the litigation was held proper: Mitchell v. Barnes, 22 Hun, 194.

[3] While this jurisdiction is well settled, the recent English decisions hold that it will not be exercised if the probate court has already appointed an administrator *ad litem;* but if no such temporary administrator has been appointed, the court of equity will still appoint a receiver: Whitworth v. Whyddon, 2 Macn. & G. 52, 55; King v. King, 6 Ves. 172; Richards v. Chave, 12 Ves. 462; Edmunds v. Bird, 1 Ves. & B. 542; Atkinson v. Henshaw, 2 Ves. & B. 85; Ball v. Oliver, 2 Ves. & B. 96; Rutherford v. Douglas, 1 Sim. & St. 111, note; Watkins v. Brent, 1 Mylne & C. 97, 102; Devey v. Thornton, 9 Hare, 222, 229; Anderson v. Guichard, 9 Hare, 275; Rendall v. Rendall, 1 Hare, 152; Jones v. Goodrich, 10 Sim. 327; Reed v. Harris, 7 Sim. 639; Wood v. Hitchings, 2 Beav. 289; Veret v. Duprez, L. R. 6 Eq. 329; Hitchen v. Birks, L. R. 10 Eq. 471; Parkin v. Seddons, L. R. 16 Eq. 34; Tewart v. Lawson, L. R. 18 Eq. 490; Flagler v. Blunt, 32 N. J. Eq. 518; Osborn v. United States Bank, 9 Wheat. 738; Schlecht's Appeal, 60 Pa. St. 172; Rachel Colvin's Case, 3 Md. Ch. 278.

§ 1333. **The Same. Second Class.**— The second class of cases is based upon the fact that all of the parties are equally entitled to the possession of the property which is the subject-matter of the controversy, but it is not just and proper, from the nature of the dispute and of their relations with each other, that either one of them should be allowed to retain possession and control during the litigation. While the foundation of the remedy is, of course, the danger, yet it is not always essential that there should be any element of actual fraud or breach of trust. The most important instances which do or may belong to this class are: 1. Suits between partners.[1] In suits for a dissolution or winding up of a partnership, and even in some very special cases without a dissolution, the court may appoint a receiver of the firm assets, when there is any misconduct on the part of the defendants, and even, perhaps, where the partners themselves are wholly unable to agree as to the management of the property and the settlement of the partnership affairs. The jurisdiction is,

[1] My limits do not permit a discussion of the particular circumstances under which a receiver will or will not be appointed; the cases cited furnish many illustrations. In general, a dissolution must have occurred, or must be asked; although in extreme cases of misconduct and danger therefrom, an *ad interim* receiver may be appointed without a dissolution. A disagreement among the partners themselves is essential: Hall v. Hall, 3 Macn. & G. 79; Fairburn v. Pearson, 2 Macn. & G. 144; Clegg v. Fishwick, 1 Macn. & G. 294 (after death of a partner); Roberts v. Eberhardt, Kay, 148; Sheppard v. Oxenford, 1 Kay & J. 491; Evans v. Coventry, 5 De Gex, M. & G. 911; Butchart v. Dresser, 4 De Gex, M. & G. 542; Smith v. Jeyes, 4 Beav. 503; Blakeney v. Dufaur, 15 Beav. 40; Hale v. Hale, 4 Beav. 369; Waters v. Taylor, 15 Ves. 10; Goodman v. Whitcomb, 1 Jacob & W. 589; Const v. Harris, Turn. & R. 496; Bard v. Bingham, 54 Ala. 463; Anderson v. Powell, 44 Iowa, 20; Law v. Ford, 2 Paige, 310; Marten v. Van Schaick, 4 Paige, 479; Garretson v. Weaver, 3 Edw. Ch. 385; Smith v. Lowe, 1 Edw. Ch. 33; Gregory v. Gregory, 1 Sweeny, 613; Sieghortner v. Weissenborn, 20 N. J. Eq. 172; Randall v. Morrell, 17 N. J. Eq. 343, 346; Renton v. Chaplain, 9 N. J. Eq. 62; Birdsall v. Colie, 10 N. J. Eq. 63; Cox v. Peters, 13 N. J. Eq. 39; Wolbert v. Harris, 7 N. J. Eq. 605; Sloan v. Moore, 37 Pa. St. 217; Holden's Adm'rs v. McMakin, 1 Pars. Cas. 270; Whitman v. Robinson, 21 Md. 30; Walker v. House, 4 Md. Ch. 39; Drury v. Roberts, 2 Md. Ch. 157; Williamson v. Wilson, 1 Bland, 418; Speights v. Peters, 9 Gill, 472; Roys v. Vilas, 18 Wis. 169; Allen v. Hill, 16 Cal. 113; Todd v. Rich, 2 Tenn. Ch. 107.

however, always exercised with great carefulness and caution. 2. In suits for partition between co-owners.[2] In suits between co-owners of mines and collieries the English courts grant a receiver upon the same grounds and under the same circumstances as in those between partners; but in all ordinary cases of partition between legal co-owners of land, a receiver is not generally appointed unless some of the parties are in sole possession, to the exclusion of the others. 3. In suits between conflicting claimants of land, especially between parties claiming under legal titles, a receiver will not ordinarily be appointed. The remedy, however, may be granted under special circumstances, in cases of gross fraud, or great danger, or where possession is maintained by violence, and the like. In such cases the court acts with great caution, only where the plaintiff's rights are reasonably certain, and the danger is apparent.[3]

§ 1334. **The Same. Third Class.**— The third class embraces those cases in which the person holding title to the property is in a position of trust or of *quasi* trust, and is violating his fiduciary duties by misusing, misapplying, or wasting the property, and is thereby endangering the

[2] Mines and collieries. The working of a mine or colliery by co-owners is necessarily a business analogous to a partnership: Adams's Equity, 247, 354; Roberts v. Eberhardt, Kay, 148; Crawshay v. Maule, 1 Swanst. 405, 518, 523; Jefferys v. Smith, 1 Jacob & W. 298; Fereday v. Wightwick, 1 Russ. & M. 45; Bentley v. Bates, 4 Younge & C. 182; Vice v. Thomas, 4 Younge & C. 538. Partition between ordinary co-owners: Tyson v. Fairclough, 2 Sim. & St. 142; Evelyn v. Evelyn, 2 Dick. 800; Street v. Anderton, 4 Brown Ch. 414; Milbank v. Revett, 2 Mer. 405; Porter v. Lopes, L. R. 7 Ch. Div. 358 (Sir George Jessel spoke of the jurisdiction as enlarged by statute); Darcin v. Wells, 61 How. Pr. 259; Cassetty v. Capps, 3 Tenn. Ch. 524; Williams v. Jenkins, 11 Ga. 595; Brenan v. Preston, 2 De Gex, M. & G. 813 (a receiver appointed in a suit concerning title to machinery between part owners of a ship).

[3] Huguenin v. Baseley, 13 Ves. 105; Stilwell v. Wilkins, Jacob, 280; Clark v. Dew, 1 Russ. & M. 103; Jones v. Goodrich, 10 Sim. 327; Toldervy v. Colt, 1 Younge & C. 621; Earl Talbot v. Hope Scott, 4 Kay & J. 96; Hlawacek v. Bohman, 51 Wis. 92; Davis v. Reaves, 2 Lea, 649; Johnson v. Tucker, 2 Tenn. Ch. 398; Mays v. Wherry, 3 Tenn. Ch. 34; Mapes v. Scott, 4 Ill. App. 268; Rollins v. Henry, 77 N. C. 467; Battle v. Davis, 66 N. C. 252; Twitty v. Logan, 80 N. C. 69; Chappell v. Boyd, 56 Ga. 578; Williams v. Jenkins, 11 Ga. 595; Jones v. Dougherty, 10 Ga. 273; Guernsey v. Powers, 9 Hun, 78.

rights of other persons beneficially interested. In many, but not in all, the instances falling within this class, the plaintiff has, and is seeking to enforce, some equitable estate or interest; but whatever be the nature of his right, the ground of the remedy is always the misconduct of the party holding the title, and the consequent danger of loss. Among the more important instances of this class in which a receiver may be appointed are the following: 1. Suits against trustees who have been guilty of a breach of trust;[1] 2. Suits under like circumstances against executors or administrators;[2] 3. Suits to enforce a mortgage when the security is inadequate, the mortgagor is insolvent, or is committing acts of waste, and the like, depreciating the value of the property;[3] 4. Suits, under like circum-

[1] Courts will not interfere with trustees' possession by a receiver unless there is real danger from their misconduct: Evans v. Coventry, 5 De Gex, M. & G. 911, 916; Middleton v. Dodswell, 13 Ves. 266, 268; Browell v. Reed, 1 Hare, 434; Bainbrigge v. Blair, 3 Beav. 421; Skinners' Co. v. Irish Soc., 1 Mylne & C. 162; Richards v. Barrett, 5 Ill. App. 510; Bowling v. Scales, 2 Tenn. Ch. 63; Vose v. Reed, 1 Woods, 647.

[2] In administration suits a receiver will not be appointed unless the executor or administrator has been guilty of misconduct, waste, misuse of assets, and the like, and there is real danger of loss: Ibid.; Anonymous, 12 Ves. 4; In re Hopkins, L. R. 19 Ch. Div. 61; Nothard v. Proctor, L. R. 1 Ch. Div. 4; Randle v. Carter, 62 Ala. 95; Briarfield Iron Works Co. v. Foster, 54 Ala. 622; Du Val v. Marshall, 30 Ark. 230; Powell v. Quinn, 49 Ga. 523; Hoge v. Hollister, 8 Baxt. 533; Haines v. Carpenter, 1 Woods, 262; Beverley v. Brooke, 4 Gratt. 187; Leddel's Ex'r v. Starr, 19 N. J. Eq. 163.

[3] In England an equitable mortgagee alone is entitled to a receiver, because a legal mortgagee can at any time gain possession, and thus secure the rents and profits: Berney v. Sewell, 1 Jacob & W. 647; Brooks v. Greathed, 1 Jacob & W. 176; Reid v. Middleton, Turn. & R. 455; Truman v. Redgrave, L. R. 18 Ch. Div. 547; Peek v. Trinsmaran Iron Co., L. R. 2 Ch. Div. 115; Pease v. Fletcher, L. R. 1 Ch. Div. 273; Lord Crewe v. Edleston, 1 De Gex & J. 93 (mortgage of tolls). A receiver may also be appointed in suits to determine the priorities among several equitable mortgages or liens: Davis v. Duke of Marlborough, 2 Swanst. 108; Angel v. Smith, 9 Ves. 335; Pritchard v. Fleetwood, 1 Mer. 54; Smith v. Earl of Effingham, 2 Beav. 232; Brooks v. Greathed, *supra;* Cortleyeu v. Hathaway, 11 N. J. Eq. 39; 64 Am. Dec. 478. In this country no distinction is made between legal and equitable mortgages. The ground of appointing a receiver is the smallness of the security, and the danger lest it should be rendered more inadequate by the conduct of the mortgagor: Price v. Dowdy, 34 Ark. 285; Haas v. Chicago Build. Soc., 89 Ill. 498; Des Moines Gas Co. v. West, 44 Iowa, 23; Worrill v. Coker, 56 Ga. 666;

stances, to enforce equitable liens, including those by judgment creditors in the nature of an equitable execution;[4] 5. Suits, under like circumstances, and for a like reason, by a vendor to enforce the specific performance of a contract for the sale of land against a vendee who is in possession;[5] 6. In suits by creditors, although not strictly creditors' actions by judgment creditors, brought to enforce their demands from the debtors' property, under some very special circumstances involving great danger of loss, such as the debtors' non-residence, insolvency, and the like;[6] 7. Suits for the rescission of a contract for the sale of land under special circumstances;[7] 8. Suits to enforce payment of the arrears of annuities;[8] 9. Suits for the protection of remaindermen against the life tenant or other

Phillips v. Eiland, 52 Miss. 721; Brasted v. Sutton, 30 N. J. Eq. 462; Mahon v. Crothers, 28 N. J. Eq. 567; Johnson v. Tucker, 2 Tenn. Ch. 398; Williams v. Noland, 2 Tenn. Ch. 151 (of personal property); Moran v. Johnston, 26 Gratt. 108; Phœnix Mut. L. Ins. Co. v. Grant, 3 McAr. 220; Pullan v. Cincinnati etc. R. R., 4 Biss. 35; for cases of receivers over corporations in suits for the enforcement of a deed of trust in the nature of a mortgage, see Allen v. Dallas etc. R. R., 3 Woods, 316; Warner v. Rising etc. Iron Co., 3 Woods, 514; Wilmer v. Atlanta etc. R'y, 2 Woods, 409.

4 Lien by deposit of title deeds: See Adams's Equity, 125. Suit by a holder of debentures secured by lien on assets of the corporation: Hopkins v. Worcester etc. Canal Prop'rs, L. R. 6 Eq. 437. Creditors' suits: Gage v. Smith, 79 Ill. 219; Kuhl v. Martin, 26 N. J. Eq. 60; Osborn v. Heyer, 2 Paige, 342; Anglo-Italian Bank v. Davies, L. R. 9 Ch. Div. 275, and cases cited.

5 A receiver pending the suit is appointed only when the land is a doubtful or inadequate security, and the vendee is insolvent, or committing waste, etc.: Hall v. Jenkinson, 2 Ves. & B. 125; Boehm v. Wood, 2 Jacob & W. 236; Shakel v. Duke of Marlborough, 4 Madd. 463; Taylor v. Eckersley, L. R. 2 Ch. Div. 302 (contract concerning chattels); Phillips v. Eiland, 52 Miss. 721; Hughes v. Hatchett, 55 Ala. 631; Tufts v. Little, 56 Ga. 139; Gunby v. Thompson, 56 Ga. 316. In a suit to enforce a grantor's or vendor's lien, a receiver will not generally be appointed before a decree, but may be after the decree: Latimer v. Aylesbury etc. R'y, L. R. 9 Ch. Div. 385; Munns v. Isle of Wight R'y, L. R. 5 Ch. 414; Pell v. Northampton etc. R'y, L. R. 2 Ch. 100.

6 The case must undoubtedly be very special, to warrant the appointment of a receiver in a suit by a simple creditor: Johnson v. Farnum, 56 Ga. 144; Ballin v. Ferst, 55 Ga. 546; Gregory v. Gregory, 1 Jones & S. 1.

7 Gibbs v. David, L. R. 20 Eq. 373.

8 In England only when the payment cannot be enforced by distress: Sollory v. Leaver, L. R. 9 Eq. 22; Buxton v. Monkhouse, Coop. 41; Probasco v. Probasco, 30 N. J. Eq. 108.

holder of the particular estate;[9] 10. Suits, under many circumstances, against corporations;[10] 11. Suits and proceedings in bankruptcy.[11]

§ 1335. The Same. Fourth Class.— This class contains those cases in which a receiver is appointed after judgment for the purpose of carrying the decree into effect. In some instances the receiver appointed on motion pending the action is continued in his office after the decree; in others, he is appointed after the decree, when no appointment would be made before the final hearing. In all instances the object of a receiver is to carry into effect a special decree, which could not otherwise be efficiently executed by ordinary process. Among the most important cases in which a receiver may thus be appointed are creditors' suits and suits to enforce other equitable liens, suits to enforce the contracts of married women against their separate estates, and suits or proceedings generally

[9] In re Fowler, L. R. 16 Ch. Div. 723.

[10] The following cases will illustrate many of the circumstances under which a receiver may be appointed over corporations or corporate property: Featherstone v. Cooke, L. R. 16 Eq. 298; Hopkins v. Worcester etc. Canal Prop'rs, L. R. 6 Eq. 437; Allen v. Dallas etc. R. R., 3 Woods, 316; Warner v. Rising etc. Iron Co., 3 Woods, 514; Wilmer v. Atlanta etc. R'y, 2 Woods, 409; North Car. etc. R. R. v. Drew, 3 Woods, 691; Union Tr. Co. v. St. Louis etc. R. R., 4 Dill. 114; Kennedy v. St. Paul etc. R. R., 2 Dill. 448; Whelpley v. Erie R'y, 6 Blatchf. 271; Bank of Bethel v. Pahquioque Bank, 14 Wall. 383; National Tr. Co. v. Miller, 33 N. J. Eq. 155; Freeholders of Middlesex v. State Bank, 28 N. J. Eq. 166; McCullough v. Merch. Loan etc. Co., 29 N. J. Eq. 217; In re Long Branch etc. R. R., 24 N. J. Eq. 398; Delaware etc. R. R. v. Erie R. R., 21 N. J. Eq. 298; La Société Française v. District Court, 53 Cal. 495; Kelly v. Alabama etc. R. R., 58 Ala. 489; Wilson v. Barney, 5 Hun, 257; Redmond v. Enfield Mfg. Co., 13 Abb. Pr., N. S., 332; Rochester v. Bronson, 41 How. Pr. 78; Brown v. Home Sav. Bank, 5 Mo. App. 1; Vermont etc. R. R. v. Vt. etc. R. R., 50 Vt. 500; Port Huron etc. R'y v. Judge of St. Clair Circuit. 31 Mich. 456; French v. Gifford, 30 Iowa, 148; Hand v. Dexter, 41 Ga. 454; People v. Security Ins. Co., 78 N. Y. 114; 34 Am. Rep. 522; 79 N. Y. 267.

[11] Salt v. Cooper, L. R. 16 Ch. Div. 544; Ex parte Browne, L. R. 16 Ch. Div. 497, In re Manchester etc. R'y, L. R. 14 Ch. Div. 645; Ex parte Rylands, L. R. 6 Ch. Div. 57; Taylor v. Eckersley, L. R. 5 Ch. Div. 740; Boyle v. Bettws etc. Co., L. R. 2 Ch. Div. 726; In re H.'s Estate, L. R. 1 Ch. Div. 276; Munns v. Isle of Wight R'y, L. R. 5 Ch. 414; Riches v. Owen, L. R. 3 Ch. 820; In re Johnson, L. R. 1 Ch. 325.

statutory for the winding up of corporations.[1] In the states adopting the reformed procedure, the codes of procedure generally contain provisions regulating the appointment of receivers.[2]

§ 1336. Powers, Rights, Duties, and Liabilities.— The appointment of a receiver during the pendency of a suit does not determine any rights or title of the litigant parties; it is made for the benefit of all. His possession, though impartial while the controversy is undecided, is regarded as on behalf of the one who is ultimately found to be entitled to the property.[1] He is in reality an officer of the

§ 1335, [1] Creditors' suits: See *post*, section on creditors' suits: Anglo-Italian Bank v. Davies, L. R. 9 Ch. Div. 275. On contracts of married women, see *ante*, section on married women's contracts: Bryant v. Bull, L. R. 10 Ch. Div. 153.

§ 1335, [2] These provisions are substantially alike in most of the codes; that of California may be taken as the type: *California:* Code Civ. Proc., sec. 564; *Arkansas:* Gantt's Dig. of Stats. 1874, secs. 4809, 4810; *Colorado:* King's Code Civ. Proc. 1880, sec. 138; *Dakota:* Hand's Code Civ. Proc. 1877, sec. 219; *Florida:* Code Civ. Proc. 1870, sec. 192; *Indiana:* 2 Davis's Rev. 1876, p. 114, sec. 199; *Iowa:* 2 Miller's Rev. Code 1880, sec. 2903; *Kansas:* Dassler's Comp. Laws 1881, p. 634, sec. 254; *Kentucky:* Bullitt's Code 1876, secs. 298, 299; *Minnesota:* Young's Stats. 1878, p. 739, sec. 207; *Missouri:* 1 Rev. Stats. 1879, secs. 3116, 3660; *Nebraska:* Brown's Comp. Stats. 1881, p. 565, sec. 266; *Nevada:* Comp. Laws 1873, p. 323, sec. 1207; *New York:* Code Civ. Proc., sec. 713; *North Carolina:* 1 Battle's Rev. 1873, p. 190, sec. 215; *Ohio:* 2 Rev. Stats. 1880, p. 1359, sec. 5587; *Oregon:* Gen. Laws 1872, p. 312, sec. 1029; *South Carolina:* Rev. Stats. 1873, p. 628, sec. 267; *Wisconsin:* Rev. Stats. 1878, p. 749, c. 126, sec. 2787. See also *Georgia:* Code 1882, p. 778, sec. 3098 (3043); p. 778, sec. 3149 (3092); *Texas:* Rev. Stats. 1879, p. 222, art. 1461.

§ 1336, [1] While my limits do not permit any discussion in detail of the receiver's powers, rights, and liabilities, the following cases, which are generally classified, will furnish many illustrations: *Who may be appointed:* In re Lloyd, L. R. 12 Ch. Div. 447; Perry v. Oriental Hotels Co., L. R. 5 Ch. 420; Benneson v. Bill, 62 Ill. 408. *When the appointment takes effect:* Edwards v. Edwards, L. R. 2 Ch. Div. 291 (not until security is given); Crowder v. Moore, 52 Ala. 220 (appointment before bill filed); Clark v. Brockway, 1 Abb. App. 351; Crane v. McCoy, 1 Bond, 422. *Effect of appointment:* Ex parte Evans, L. R. 13 Ch. Div. 252; Bolles v. Duff, 54 Barb. 215 (of consent to be a receiver). *Nature of receiver's office:* Jefferys v. Dickson, L. R. 1 Ch. 183; State v. Gambs, 68 Mo. 289 (is not a trustee of an express trust). *Interference with him, protection by the court:* Ex parte Cochrane, L. R. 20 Eq. 282; Russell v. East Anglian R'y, 3 Macn. & G. 104; Jordan v. Wells, 3 Woods, 527; Vermont etc. R. R. v. Vt. Cent. R. R., 46 Vt. 792.

court, and will be protected by it from interference by third persons in the discharge of his duties; indeed, such interference without permission of the court would be a contempt. The receiver, in all important matters, acts under special direction of the court. He must, in general, obtain its permission to bring suits, and suits cannot be

Powers, rights, and authority in general: In re Birmingham etc. R'y, L. R. 18 Ch. Div. 155; Campbell v. Compagnie Générale, L. R. 2 Ch. Div. 181; Ex parte Warren, L. R. 10 Ch. 222; Ex parte Jay, L. R. 9 Ch. 133; Armstrong v. Armstrong, L. R. 12 Eq. 614; Kennedy v. St. Paul etc. R. R., 5 Dill. 519; Stanton v. Ala. etc. R. R., 2 Woods, 506; Cowdery v. Railroad Co., 1 Woods, 331; Davis v. Gray, 16 Wall. 203; Heermans v. Clarkson, 64 N. Y. 171; Porter v. Williams, 9 N. Y. 142; 59 Am. Dec. 519; People v. Security Ins. Co., 78 N. Y. 114; 34 Am. Rep. 522; 79 N. Y. 267; Scott v. Elmore, 10 Hun, 68; Olcott v. Heermans, 3 Hun, 431; Simmons v. Wood, 45 How. Pr. 262; Elmira etc. Co. v. Erie R'y, 26 N. J. Eq. 284; Receivers v. Paterson Gas Light Co., 23 N. J. L. 283; Robinson v. Atlantic etc. R'y, 66 Pa. St. 160; Gibert v. Washington City etc. R. R., 33 Gratt. 586; Spinning v. Ohio etc. Tr. Co., 2 Disn. 336; Johnson v. Gunter, 6 Bush, 534; McCombs v. Merryhew, 40 Mich. 721; Newbold v. Peoria etc. R. R., 5 Ill. App. 367; Safford v. People, 85 Ill. 558; Tripp v. Boardman, 49 Iowa, 410; Bank of Montreal v. Chicago etc. R. R., 48 Iowa, 518; McIlrath v. Snure, 22 Minn. 391; Barron v. Mullin, 21 Minn. 374; Meredith Sav. Bank v. Simpson, 22 Kan. 414; Moseby v. Burrow, 52 Tex. 396; Weems v. Lathrop, 42 Tex. 207. *Powers to bring, maintain, or continue suits:* Campbell v. Fish, 8 Daly, 162; Donnelly v. West, 17 Hun, 564 (limited divorce); Albany etc. Ins. Co. v. Van Vranken, 42 How. Pr. 281; Calkins v. Atkinson, 2 Lans. 12; Rockwell v. Merwin, 8 Abb. Pr., N. S., 330; Garver v. Kent, 70 Ind. 428; Manlove v. Burger, 38 Ind. 211; Alexander v. Relfe, 9 Mo. App. 133; Lathrop v. Knapp, 37 Wis. 307; Miller v. Mackenzie, 29 N. J. Eq. 291; Battle v. Davis, 66 N. C. 252; Gadsden v. Whaley, 14 S. C. 210; Searles v. Jacksonville etc. R. R., 2 Woods, 621. *Particular powers.*— In the enforcement of payment of debts: Ex parte Harris, L. R. 2 Ch. Div. 423; Ex parte Hare, L. R. 10 Ch. 218; Jolly v. Arbuthnot, 4 De Gex & J. 224; Screven v. Clark, 48 Ga. 41; Seagram v. Tuck, L. R. 18 Ch. Div. 296 (right to set up statute of limitations); Ex parte Browne, L. R. 16 Ch. Div. 497 (lien on assets); Porter v. Kingman, 126 Mass. 141 (cancellation of mortgage); Pond v. Cooke, 45 Conn. 126; 29 Am. Rep. 668 (over property taken into another state); Hoover v. Montclair etc. R'y, 29 N. J. Eq. 4 (to make repairs); Mann v. Fairchild, 3 Abb. App. 152 (assignment of his right); Koontz v. Northern Bank, 16 Wall. 196 (of purchaser under receiver's deed). *His duties and liabilities in general:* Ex parte Gordon, L. R. 20 Eq. 291; Kain v. Smith, 80 N. Y. 458; Clark v. Bininger, 11 Jones & S. 126, 344; Corey v. Long, 12 Abb. Pr., N. S., 427; Coe v. N. J. etc. R. R., 27 N. J. Eq. 37; Klein v. Jewett, 26 N. J. Eq. 474; Commonwealth v. Young, 11 Phila. 606; Stewart v. Lay, 45 Iowa, 604; Demain v. Cassidy, 55 Miss. 320; Stanton v. Ala. etc. R. R., 2 Woods, 506; Davenport v. Receivers, 2 Woods, 519; Davis v. Gray, 16 Wall.

properly brought against him without permission. Although not strictly a trustee, because the legal title to the property is not vested in him, he occupies a fiduciary position, and must act with perfect good faith, and is liable to account. The exact nature of his duties depends upon the particular case.

203. *Suits against them:* Killmer v. Hobart, 8 Abb. N. C. 426; 58 How. Pr. 452 (foreign receivers); Barton v. Barbour, 3 McAr. 212; 36 Am. Rep. 104 (ditto); Express Co. v. Railroad Co., 99 U. S. 191 (for a specific performance); Palys v. Jewett, 32 N. J. Eq. 302 (at law for a tort); Hackley v. Draper, 60 N. Y. 88; 4 Thomp. & C. 614 (to set aside a fraudulent sale); De Graffenried v. Brunswick etc. R. R., 57 Ga. 22. *His liability for negligence, trespasses, etc.:* Newell v. Smith, 49 Vt. 255; Kain v. Smith, 11 Hun, 552; Henderson v. Walker, 55 Ga. 481; Meara's Adm'r v. Holbrook, 20 Ohio St. 137; 5 Am. Rep. 633; Potter v. Bunnell, 20 Ohio St. 150; Hills v. Parker, 111 Mass. 508; 15 Am. Rep. 63 (trespasses). *Particular liabilities, default in payments of balance:* In re Bell's Estate, L. R. 9 Eq. 172; Hobson v. Jones, L. R. 9 Eq. 456; Clark v. Bininger, 75 N. Y. 344. *For wrongful use of funds:* Cartwright's Case, 114 Mass. 230; Drake v. Goodridge, 6 Blatchf. 531; Wall v. Pulliam, 5 Heisk. 365 (for property lost); Hinckley v. Railroad Co., 100 U. S. 153 (for interest); Stretch v. Gowdey, 3 Tenn. Ch. 565 (failure to report); Cowdrey v. Galveston etc. R. R., 93 U. S. 352 (expenditure disallowed). *His compensation:* Hopfensack v. Hopfensack, 61 How. Pr. 498; Crook v. Findley, 60 How. Pr. 375; Gardiner v. Tyler, 2 Abb. App. 247; McArthur v. Montclair R. R., 27 N. J. Eq. 77; Jones v. Keen, 115 Mass. 170; Special Bank Comm'rs v. Cranston Sav. Bank, 12 R. I. 497; Special Bank Comm'rs v. Franklin Sav. Inst., 11 R. I. 557; Mabry v. Brown, 12 Heisk. 597; Brien v. Harriman, 1 Tenn. Ch. 467; Hutchinson v. Hampton, 1 Mont. Ter. 39.

SECOND GROUP.

REMEDIES PURELY PREVENTIVE.

CHAPTER FIRST.

INJUNCTIONS.

SECTION I.

TO PROTECT OR RESTRAIN THE VIOLATION OF OBLIGATIONS AND RIGHTS OF PROPERTY OR OF CONTRACT, EITHER LEGAL OR EQUITABLE.

ANALYSIS.

§ 1337. General nature and objects: Interdicts.
§ 1338. Fundamental principle.
§ 1339. To protect purely equitable estates or interests, and in aid of purely equitable remedies.
§ 1340. The same: Particular instances.
§§ 1341–1344. To prevent the violation of contracts.
§ 1341. General doctrine.
§ 1342. 1. Restrictive covenants creating equitable easements.
§ 1343. 2. Contracts for personal services or acts.
§ 1344. 3. Other agreements generally negative in their nature.
§ 1345. Miscellaneous cases: Corporations and their officers; between mortgagor and mortgagee; public officers; cloud on title; married women's property; partners, etc.

§ 1337. General Nature and Object.—The remedy of injunction was undoubtedly borrowed by the chancellors from the "interdicts" of the Roman law.[1] An injunction may

[1] As to "interdicts," see Gaius's Inst., lib. 4, secs. 138–170; Poste's ed., 492–520; Just. Inst., lib. 4, tit. 15, secs. 1–8; Sandars's ed., 1st Am. ed., 58, 570–580. The general definition as given by Gaius (Ibid., sec. 139) is as follows: "Under certain circumstances, chiefly when possession or *quasi* possession [i. e., possession of a servitude] is in dispute, the first step in the legal proceedings is the interposition of the prætor or pro-consul, who commands some performance or forbearance; which commands, formulated in solemn terms, are called interdicts." The most general formula was "*vim fieri veto, exhibeas, restituas*," "I forbid you to use violence, you must pro-

be either a final remedy obtained by a suit, or a preliminary and interlocutory relief granted while the suit is pending. In the first case it is a decree, in the second, an order or writ. Whatever be its form, decree or order, the remedy by ordinary injunction is wholly preventive, prohibitory, or protective. The same is true in theory and in form of a mandatory injunction, which always by its language prohibits the continuance of an act or of a structure, although in effect and in its essential nature it is wholly restorative, and compels the defendant to restore the thing to its original situation. While injunctions may thus be final, or preliminary and ancillary to other final relief, they all depend upon the same *general* principles, doctrines, and rules which determine and regulate the exercise of the jurisdiction to award them. In the states adopting the reformed procedure, the codes contain general provisions describing the cases in which an injunction may be issued, but these provisions do not materially alter the settled equitable jurisdiction, except in reference to injunctions against actions or judgments at law.[2]

duce, you must restore." There were thus three distinct species of interdicts: 1. The prohibitory, where the defendant was commanded to refrain or desist from some act, answering to our ordinary injunction; 2. The exhibitory, where the defendant was commanded to produce and exhibit something in his possession,— *exhibeas,* which does not answer to any kind of injunction, but has some analogies with certain common-law writs; 3. The restorative, where the defendant was commanded to restore something to its original position, clearly resembling in its effect our mandatory injunction. Interdicts were granted where some danger was apprehended, or some injury was being done, to something of a *quasi* public character, as the stopping up of a highway, or to some private interest or right. One of the most common occasions of the interdict was to protect the plaintiff in his possession of a thing, in which case the interdict *uti possidetis* was used to protect possession of land and buildings, and the interdict *utrubi* for movables. In the interdict *uti possidetis,* the defendant was forbidden to interfere with the possession "*nec vi, nec clam, nec precario.*" The granting of interdicts belonged wholly to the "extraordinary" or equitable jurisdiction of the magistrate: See *ante,* vol. 1, § 6.

[2] *California:* Code Civ. Proc., sec. 526; Civ. Code, secs. 3420, 3422, 3423; *Arkansas:* Dig. of Stats. 1874, sec. 3450; *Colorado:* Code Civ. Proc. 1880, sec. 119; *Dakota:* Code Civ. Proc. 1877, p. 509, sec. 189; *Florida:* Code Civ. Proc. 1870, sec. 168; *Indiana:* 2 Davis's Stats. 1876, p. 93, sec. 137; *Iowa:* 2

§ 1338. Fundamental Principle.— In determining whether an injunction will be issued to protect any right of property, to enforce any obligation, or to prevent any wrong, there is one fundamental principle of the utmost importance, which furnishes the answer to any questions, the solution to any difficulties which may arise. This principle is both affirmative and negative, and the affirmative aspect of it should never be lost sight of, any more than the negative side.[1] The general principle may be stated as follows: Wherever a right exists or is created, by contract, by the ownership of property or otherwise, cognizable by law, *a violation of that right will be prohibited*, unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. *The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise.* This jurisdiction of equity to prevent the commission of wrong is, however, modified and restricted by considerations of expediency and of convenience which confine its application to those cases in which the legal remedy is not full and adequate. Equity will not interfere to restrain the

Miller's Rev. Code 1880, secs. 3386, 3388; *Kansas:* Dassler's Comp. Laws 1881, p. 632, sec. 238; *Kentucky:* Bullitt's Codes 1876, p. 59, sec. 272; *Minnesota:* Young's Stats. 1878, p. 738, sec. 200; *Missouri:* 1 Rev. Stats. 1879, p. 454, sec. 2703; *Nebraska:* Brown's Comp. Laws 1881, p. 563, sec. 251; *Nevada:* 1 Comp. Laws 1873, p. 314, sec. 1173; *New York:* Code Civ. Proc., secs. 603, 604; *North Carolina:* Battle's Rev. 1873, p. 183, sec. 189; *Ohio:* 2 Rev. Stats. 1880, p. 1353, sec. 5572; *Oregon:* Gen. Laws 1872, p. 194, sec. 407; *South Carolina:* Rev. Stats. 1873, p. 621, sec. 242; *Wisconsin:* Rev. Stats. 1878, sec. 2774. See also *Georgia:* Code 1882, p. 803, secs. 3210 (3149); *Texas:* Rev. Stats. 1879, p. 415, art. 2873.

[1] A comparison of the English and American reports will show that our courts have dwelt too much on the negative side of this principle, and have almost ignored its affirmative aspect. While the English judges have gradually but steadily enlarged the scope of the injunction, the tendency of the American decisions has been to narrow it even within the well-established limits of the jurisdiction. If "an ounce of prevention is worth a pound of cure," this tendency is clearly opposed to the best interests of society.

breach of a contract, or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction.[2] In the treatment of this twofold principle, I shall state the general rules which have been derived from it, and which regulate the exercise of the jurisdiction, and shall illustrate these rules by enumerating the more important instances to which they have been applied. The general object of the discussion will be to show when an injunction may be granted.[3]

§ 1339. **To Protect Purely Equitable Estates or Interests, and in Aid of Purely Equitable Remedies.**— The jurisdiction to grant injunctions restraining acts in violation of trusts and fiduciary obligations, or in violation of any other purely equitable estates, interests, or claims in and to specific property, is really commensurate with the equitable

[2] Jersey City v. Gardner, 33 N. J. Eq. 622; Powell v. Foster, 59 Ga. 790; Johnson v. Conn. Bank, 21 Conn. 148, 157; Watson v. Sutherland, 5 Wall. 74. An injunction will not be granted to restrain arrests: Davis v. Am. Soc. etc., 6 Daly, 81; 75 N. Y. 362; Cohen v. Goldsboro, 77 N. C. 2; nor to restrain other mere criminal acts: Phillips v. Stone Mountain, 61 Ga. 386; Life Ass'n of Am. v. Boogher, 3 Mo. App. 173. As to injunction against threatened acts in another state, see Atlantic etc. Tel. Co. v. Baltimore & O. R. R., 14 Jones & S. 377; Western U. Tel. Co. v. Western etc. R. R., 8 Baxt. 54. As to the grounds and requisites for the granting of a preliminary injunction, see McHenry v. Jewett, 90 N. Y. 58; Sheridan v. Jackson, 72 N. Y. 170; Scofield v. Whitelegge, 49 N. Y. 259; N. Y. Printing etc. Estab. v. Fitch, 1 Paige, 98; Corporation of N. Y. v. Mapes, 6 Johns. Ch. 46; Ogden v. Kip, 6 Johns. Ch. 160; Babcock v. New Jersey etc. Co., 20 N. J. Eq. 296; Richard's Appeal, 57 Pa. St. 105; 98 Am. Dec. 202.

[3] The general effect produced by some text-books and judicial opinions might lead the reader to suppose that the main object of the writers or the judges was to show when injunctions could *not* be granted. The full force and effect of this most beneficial remedy, and the freedom with which it is granted by courts of the highest authority, can only be ascertained by an actual examination of the decided cases. It is for this reason that I have cited so many decisions under several of the subsequent heads. An exhaustive treatment of injunctions would require a whole volume, and would, in fact, be a review of the entire remedial department of equity.

remedies given to enforce trusts and fiduciary duties, or to establish and enforce any other equitable estates, interests, or claims, with respect to specific things, whether lands, chattels, securities, or funds of money, or to relieve against mistake, or fraud done or contemplated with respect to such things. In all such cases the question whether the remedy at law is adequate cannot arise; much less can it be the criterion by which to determine whether an injunction can be granted; for there is no remedy at law. Since the estate, interest, or claim of the complainant is purely equitable, it is exclusively cognizable by equity; and if its existence is shown, a court of equity not only has the jurisdiction, but is bound to grant every kind of remedy necessary to its complete establishment, protection, and enforcement according to its essential nature. Many breaches of trust are of such a nature that, if accomplished, they would completely defeat the right of the beneficiary to the specific trust property. The equitable reliefs against mistake or fraud with respect to specific equitable property, and the equitable remedies of all kinds to enforce trusts, express or by operation of law, and fiduciary duties concerning specific property, and to enforce any other equitable estate, interest, lien, or right in or over specific property, would be of comparatively little practical value, unless the court could by injunction restrain the alienation, transfer, or encumbrance of such property, and all other modes of dealing with it which would prejudice the rights of the complainant, and prevent him from acquiring the title, or from enjoying his estate, or from enforcing his claim, or from receiving the full benefits of his final relief.[1] It may therefore be stated as a general

[1] It is true that in suits concerning land, the statute authorizing a notice of *lis pendens* to be filed affords some security to the complainant against transfers and encumbrances pending the suit. But this statute does not affect the truth nor generality of the proposition contained in the text. *At the utmost*, it only shows that in such cases "*the aid of an injunction is not required.*" But the notice of *lis pendens* is, at best, only a partial relief; it does not prevent a transfer; it does not even obviate the necessity of an in-

proposition, that whenever the equitable relief against mistake or fraud with respect to specific property, or the equitable remedy of enforcing trusts or fiduciary duties concerning specific property, or of enforcing any other equitable estates, interests, or claims in or to specific property, *requires the aid of an injunction,* a court of equity has jurisdiction, and will exercise that jurisdiction, to grant an injunction, either pending the suit or as a part of the final decree, to restrain a breach of trust or of fiduciary duty, or to restrain an alienation, transfer, assignment, encumbrance, or other kind of dealing with the property, which would be in violation of the trust or fiduciary duty, or in fraud of the complainant's rights, and which would therefore interfere with and prejudice the ultimate remedies to which he may be entitled with respect to such property. The particular instances to which this doctrine is applied are almost numberless, and extend through the entire range of equitable remedies against mistake and fraud, or to enforce trusts and fiduciary duties, or to establish and enforce other equitable estates, interests, liens, and primary rights in and to specific property of any kind or form.

§ 1340. The Same. Particular Instances.— Among the instances in which equity will grant an injunction, preliminary or final, in pursuance of the general doctrine as stated in the foregoing paragraph, the following are some of the most important, and they fully illustrate and establish the doctrine itself, in all its generality, and the grounds upon which it rests: To prevent the transfer of negotiable instruments, at the suit of the defrauded maker or acceptor, or of the party claiming to be the true owner, or to have an interest in them;[1] or the transfer, under like

junction in many suits concerning land; and it does not generally extend to other suits at all.

1 Lord Chedworth v. Edwards, 8 Ves. 46; Stead v. Clay, 1 Sim. 294; 4 Russ. 550; Smith v. Haytwell, Amb. 66; 3 Atk. 566; King v. Hamlet, 4 Sim. 223; Hood v. Aston, 1 Russ. 412; Thompson v. Smith, 1 Madd. 395; Lloyd v. Gurdon, 2 Swanst. 180; Patrick v. Harrison, 3 Brown Ch. 476; Thiedemann v.

circumstances, of stocks or other securities not strictly negotiable;[2] or even the transfer of chattels, when of a special nature and value, such as diamonds, and the like articles;[3] to prevent a payment of money in violation of a trust;[4] to restrain a breach of trust;[5] to prevent a defendant from affecting or encumbering the property in litigation by contract, conveyance, mortgage, or any other act;[6]

Goldschmidt, 1 De Gex, F. & J. 4, 10 (an injunction refused against a defendant who was a *bona fide* holder for value); Ferguson v. Fisk, 28 Conn. 501; Hile v. Davison, 20 N. J. Eq. 228; Metler's Adm'rs v. Metler, 18 N. J. Eq. 270; 19 N. J. Eq. 457; Zeigler v. Beasley, 44 Ga. 56; Hinkle v. Margerum, 50 Ind. 240; Osborn v. U. S. Bank, 9 Wheat. 738, 845; Deaderick v. Mitchell, 6 Baxt. 35; Bridges v. Robinson, 2 Tenn. Ch. 720; Belohradsky v. Kuhn, 69 Ill. 547.

This remedy is often used in connection with suits for cancellation: See *post*, chapter on cancellation.

[2] King v. King, 6 Ves. 172; Lord Chedworth v. Edwards, 8 Ves. 46; Stead v. Clay, 1 Sim. 294; 4 Russ. 550; Athenæum Life Ass. Co. v. Pooley, 3 De Gex & J. 294; Osborn v. U. S. Bank, 9 Wheat. 738, 844, 845; Hile v. Davison, 20 N. J. Eq. 228; Elder v. First Nat. Bank, 12 Kan. 238.

[3] The jurisdiction in such case depends upon the same reasons as the analogous jurisdiction to compel the delivery up of such unique chattels, or the specific performance of contracts for their sale: *Post*, § 1402; Ximenes v. Franco, 1 Dick. 149; Tonnins v. Prout, 1 Dick. 387.

[4] Reeve v. Parkins, 2 Jacob & W. 390; Green v. Lowes, 3 Brown Ch. 217; Whittingham v. Burgoyne, 3 Anstr. 900; Mathews v. Jones, 2 Anstr. 506; Hawkshaw v. Parkins, 2 Swanst. 539; Hine v. Handy, 1 Johns. Ch. 6. In Bank of Turkey v. Ottoman Co., L. R. 2 Eq. 366, an injunction was refused because the money was not shown to be impressed with a trust; if this fact had appeared, the opinion clearly indicates that an injunction would have been granted. See also Ernest v. Croysdill, 2 De Gex, F. & J. 175.

[5] Dance v. Goldingham, L. R. 8 Ch. 902; Brenan v. Preston, 2 De Gex, M. & G. 813; North Car. R. R. v. Drew, 3 Woods, 674. In suits by a beneficiary against his trustee, an injunction, if needed, would be granted as a matter of course. To restrain violations of confidence: See Little v. Kingswood Coll. Co., L. R. 20 Ch. Div. 733 (to prevent an attorney from acting against a former client); Lewis v. Smith, 1 Macn. & G. 417 (to prevent disclosure of confidential communications by an attorney); Brenan v. Preston, 2 De Gex, M. & G. 813 (against a ship's husband); Phelan v. Boylan, 25 Wis. 679 (by reversioner against life tenant to prevent his use of a tax title). To restrain the disclosure of confidential communications, trade secrets, private papers, etc.: See Yovatt v. Winyard, 1 Jacob & W. 394; Newbery v. James, 2 Mer. 446, 451; Williams v. Williams, 3 Mer. 157; Morison v. Moat, 9 Hare, 241; Peabody v. Norfolk, 98 Mass. 452; 96 Am. Dec. 664.

[6] Great West. R'y v. Birmingham etc. R'y, 2 Phill. Ch. 597, 602, 603, per Lord Cottenham; Echliff v. Baldwin, 16 Ves. 267; Curtis v. Marquis of Buck-

and, in general, in all suits to enforce an equitable right against specific property,— as to enforce an equitable estate and compel the conveyance of the legal title, to enforce a trust, or an equitable lien, to compel the specific performance of a contract, and the like,— the court will grant an injunction to restrain a threatened transfer of the property, whether land, chattels, or securities, during the pendency of the action.[7]

§ 1341. **To Prevent the Violation of Contracts.**—An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules; and it may be stated as a general proposition that wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit. Where the agreement stipulates that certain acts shall not be done, an injunction preventing the commission of those acts is evi-

ingham, 3 Ves. & B. 168; Spiller v. Spiller, 3 Swanst. 556; and see cases in next following note.

[7] Fells v. Read, 3 Ves. 70; Lloyd v. Loaring, 6 Ves. 773; Nutbrown v. Thornton, 10 Ves. 159, 163; Echliff v. Baldwin, 16 Ves. 267; Daly v. Kelly, 4 Dow, 417, 440; Wood v. Rowcliffe, 3 Hare, 304, 308; Robinson v. Pickering, L. R. 16 Ch. Div. 371, 660 (in suit to enforce married woman's contract against her separate estate, an injunction restraining her from aliening her property will not be granted, because her contract creates no lien or charge on her estate); Lemprière v. Lange, L. R. 12 Ch. Div. 675 (injunction in suit for cancellation on account of fraud); Hart v. Herwig, L. R. 8 Ch. 860 (in specific performance of contract for sale of a ship); Beyfus v. Bullock, L. R. 7 Eq. 391 (in suit to set aside a deed for fraud); Hadley v. London Bank of Scotland, 3 De Gex, J. & S. 63 (in specific performance); De Mattos v. Gibson, 4 De Gex & J. 276 (ditto); Brenan v. Preston, 2 De Gex, M. & G. 813 (suit against trustee); Lemprière v. Lange, L. R. 12 Ch. Div. 675; Vavasseur v. Krupp, L. R. 9 Ch. Div. 351; Building Ass'n v. Ashmead, 7 Phila. 272; Joseph v. McGill, 52 Iowa, 127 (against fraudulent grantee); French v. Snell, 29 N. J. Eq. 95 (against assignee of a mortgage; the assignment void); Venable v. Everett, 63 Ga. 633; Sierra Nev. Min. Co. v. Sears, 10 Nev. 346; Vogler v. Montgomery, 54 Mo. 577.

dently the only mode of enforcement; but the remedy of injunction is not confined to contracts whose stipulations are negative; it often extends to those which are affirmative in their provisions, where the affirmative stipulation implies or includes a negative. The universal test of the jurisdiction, admitted alike by the courts of England and of the United States, is the inadequacy of the legal remedy of damages in the class of contracts to which the particular instance belongs.[1] This general doctrine is fully sustained by the cases cited in the succeeding paragraphs as illustrations of its application. A clearer notion of the doctrine will perhaps be obtained by considering the contracts to which it applies in three main classes: 1. Those restrictive covenants which create equitable easements; 2. Agreements stipulating for personal services or acts; 3. Other agreements, generally negative in their nature.

§ 1342. 1. Restrictive Covenants Creating Equitable Easements.— This doctrine has already been examined, and it has been shown that restrictive covenants in deeds, leases, and agreements limiting the use of land in a specified manner, or prescribing a particular use, which create equitable servitudes on the land, will be specifically enforced in equity by means of an injunction, not only between the immediate parties, but also against subsequent purchasers with notice, even when the covenants are not of the kind which technically run with the land.[1] The injunction in this class of cases is granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff

§ 1341, [1] The modern English decisions have been much more liberal than the American cases in applying this test, and the English courts have more freely used the injunction to prevent the violation of contracts than the majority of the American judges have been willing to go. The *tendency* of the American courts has been to limit, rather than to enlarge, the jurisdiction in cases of contracts. English courts will enjoin the violation of some contracts, even though they cannot be specifically enforced. The American decisions, with few exceptions, refuse to adopt this doctrine.

§ 1342, [1] See *ante*, vol. 2, § 689; vol. 3, § 1295.

has sustained *any* pecuniary damages, are wholly immaterial. In the words of one of the ablest of modern equity judges: "It is clearly established by authority that there is sufficient to justify the court interfering, if there has been a breach of the covenant. It is not for the court, but the plaintiffs, to estimate the amount of damages that arises from the injury inflicted upon them. The moment the court finds that there has been a breach of the covenant, that is an injury, and the court has no right to measure it, and no right to refuse to the plaintiff the specific performance of his contract, although his remedy is that which I have described," namely, an injunction.[2]

§ 1343. 2. Contracts for Personal Services or Acts.— Where a contract stipulates for special, unique, or extraordinary personal services or acts, or for such services or acts to be rendered or done by a party having special, unique, and extraordinary qualifications,— as, for example, by an eminent actor, singer, artist, and the like,— it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the

2 Per Sir George Jessel, M. R., in Leech v. Schweder, L. R. 9 Ch. 463, 465, note, 468, note; Tipping v. Eckersley, 2 Kay & J. 264, 270, 273; Dickenson v. Grand Junc. C. Co., 15 Beav. 260, 270; Western v. MacDermot, L. R. 1 Eq. 499, 505; 2 Ch. 72, 75; Evans v. Davis, L. R. 10 Ch. Div. 747; Kemp v. Sober, 1 Sim., N. S., 517, 520. For illustrations of such restrictive covenants and of the general doctrine, see cases cited *ante*, under §§ 689, 1295; Lord Grey de Wilton v. Saxon, 6 Ves. 106; Fleming v. Snook, 5 Beav. 250; Hodson v. Coppard, 29 Beav. 4; Bramwell v. Lacy, L. R. 10 Ch. Div. 691; Evans v. Davis, L. R. 10 Ch. Div. 747; Master v. Hansard, L. R. 4 Ch. Div. 718 (injunction refused; no breach); Lord Manners v. Johnson, L. R. 1 Ch. Div. 673; Aspden v. Seddon, L. R. 10 Ch. 394 (no breach); Gearns v. Baker, 10 Ch. 355 (ditto); Booth v. Alcock, L. R. 8 Ch. 663 (ditto); Catt v. Tourle, L. R. 4 Ch. 654; Leader v. Moody, L. R. 20 Eq. 145 (injunction refused under very special facts); Telford v. Metrop. Board of Works, L. R. 13 Eq. 574; Feilden v. Slater, L. R. 7 Eq. 523; Peek v. Matthews, L. R. 3 Eq. 515 (injunction refused; plaintiff's acquiescence); Lloyd v. London etc. R'y, 2 De Gex, J. & S. 568; Piggott v. Stratton, 1 De Gex, F. & J. 33; Nicholson v. Rose, 4 De Gex & J. 10; Coles v. Sims, 5 De Gex, M. & G. 1; Hall v. Wesster, 7 Mo. App. 56; Steward v. Winters, 4 Sand. Ch. 587; Trustees etc. v. Thacher, 87 N. Y. 311; 41 Am. Rep. 365; and see cases cited in note under § 1344.

same kind of services or acts elsewhere, or by employing any other person. It is, however, a familiar doctrine that a court of equity will not exercise its jurisdiction to grant the remedy of an *affirmative* specific performance, however inadequate may be the remedy of damages, whenever the contract is of such a nature that the decree for its specific performance cannot be enforced and its obedience compelled by the ordinary processes of the court. A specific performance in such cases is said to be impossible; and contracts stipulating for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel an actor to act, a singer to sing, or an artist to paint. Applying the same course of reasoning, the English courts formerly held that they could not *negatively* enforce the specific performance of such contracts by means of an injunction restraining their violation.[1] Those courts have, however, entirely receded from this latter conclusion. The rule is now firmly established in England that the violation of such contracts may be restrained by injunction, whenever the legal remedy of damages would be inadequate, and the contract is of such a nature that its negative specific enforcement is possible. This rule was first applied to stipulations which were in form expressly negative, but was soon extended to affirmative contracts which implied or involved negative stipulations.[2]

[1] Kemble v. Kean, 6 Sim. 333; Kimberley v. Jennings, 6 Sim. 340; for American decisions to the same effect, see next following notes.

[2] The leading case is Lumley v. Wagner, 1 De Gex, M. & G. 604, in which the defendant, a "prima donna," had agreed to sing for a certain specified period in the plaintiff's opera-house, and also that she would not sing elsewhere during that time. The opinion by Lord Chancellor St. Leonards contains a full review of the previous authorities, and a most able and convincing discussion of the principle. In Montague v. Flockton, L. R. 16 Eq. 189, the rule was extended to a contract by an actor which contained no negative stipulation. See also Wolverhampton etc. R'y v. London etc. R'y, L. R. 16 Eq. 433; Ward v. Beeton, L. R. 19 Eq. 207; Donnell v. Bennett, L. R. 22 Ch. Div. 835; Fothergill v. Rowland, L. R. 17 Eq. 132, 141; Garrett v. Banstead etc. R'y, 4 De Gex, J. & S. 462; Munro v. Wivenhoe etc. R'y, 4 De Gex, J. & S. 723; Jennings v. Brighton etc. Board, 4 De Gex, J. & S.

§ 1344. 3. Other Agreements Generally Negative in their Nature.—In all these agreements, where the stipulations are expressly negative in form, and where they belong to the class of which the specific performance would be enforced if they were affirmative in form, an injunction to restrain their violation will be granted as a general rule, and almost as a matter of course. The inadequacy of the legal remedy is the criterion; but the fact that the agreements belong to a class which would be specifically enforced necessarily shows that the legal remedy is inadequate. The particular instances of this class are very numerous, and some of the most important examples are placed in the foot-note.[1]

735; De Mattos v. Gibson, 4 De Gex & J. 276 (a charter-party); Johnson v. Shrewsbury etc. R'y, 3 De Gex, M. & G. 914; Stocker v. Brockelbank, 3 Macn. & G. 250; Sainter v. Ferguson, 1 Macn. & G. 286. The most recent English decisions interfere to restrain the violation of such contracts even while conceding that their specific performance could not be enforced. This doctrine has been adopted and acted upon to its full extent by a few modern American cases: Western U. Tel. Co. v. Union Pac. R'y, 1 McCrary, 558; Western U. Tel. Co. v. St. Jo. etc. R'y, 1 McCrary, 565; Singer etc. Co. v. Union etc. Co., 1 Holmes, 253. The American courts generally have either rejected the doctrine of Lumley v. Wagner entirely, or have accepted it only to a partial extent: See Sanquirico v. Benedetti, 1 Barb. 315; Bank of Cal. v. Fresno etc. Co., 53 Cal. 201; Western U. Tel. Co. v. Western etc. R. R., 8 Baxt. 54; Crutchfield v. Wason Car Works, 8 Baxt. 242; Smith v. McElwain, 57 Ga. 247; Hahn v. Concordia Soc., 42 Md. 460; Manhattan Mfg. etc. Co. v. N. J. Stock Yard etc. Co., 23 N. J. Eq. 161; Gallagher v. Fayette Co. R. R., 38 Pa. St. 102. In all cases, English and American, the inadequacy of the legal remedy is the sole criterion for interference by injunction to prevent the violation of any contract.

[1] Agreements not to carry on a trade: Barret v. Blagrave, 5 Ves. 555; 6 Ves. 104; Williams v. Williams, 2 Swanst. 253; Shackle v. Baker, 14 Ves. 468; Cruttwell v. Lye, 17 Ves. 335; Harrison v. Gardner, 2 Madd. 198; Ginesi v. Cooper, L. R. 14 Ch. Div. 596; Jones v. Heavens, L. R. 4 Ch. Div. 636; Altman v. Royal Aqua. Soc., L. R. 3 Ch. Div. 228; Clements v. Welles, L. R. 1 Eq. 200; Turner v. Evans, 2 De Gex, M. & G. 740; Cobbs v. Niblo, 6 Ill. App. 60; Ropes v. Upton, 125 Mass. 258; McNutt v. McEwen, 10 Phila. 112; Carroll v. Hickes, 10 Phila. 308; McClurg's Appeal, 58 Pa. St. 51; Harkinson's Appeal, 78 Pa. St. 196; 21 Am. Rep. 9; Richardson v. Peacock, 28 N. J. Eq. 151; 26 N. J. Eq. 40; Baumgarten v. Broadaway, 77 N. C. 8; Berger v. Armstrong, 41 Iowa, 447; Caswell v. Gibbs, 33 Mich. 331; Doty v. Martin, 32 Mich. 462; Butler v. Burleson, 16 Vt. 176; Guerand v. Dandelet, 32 Md. 561; 3 Am. Rep. 164. Not to build, etc.: Rankin v. Huskisson, 4

§ 1345. Miscellaneous Cases.—As has already been stated, an injunction will always be granted, if necessary, to protect, aid, or enforce any equitable estate, interest, or primary right, or to secure and render efficient any purely equitable remedy. Among the most important instances in which this general doctrine is applied, in addition to those already mentioned, are the following: Against *Corporations* and their directors and officers, to restrain acts which are illegal, *ultra vires,* or in violation of their fiduciary duties.[1] While the right to membership in a cor-

Sim. 13; Lloyd v. London etc. R'y, 2 De Gex, J. & S. 568; Bowes v. Law, L. R. 9 Eq. 636; St. Andrew's Church's Appeal, 67 Pa. St. 512. Not to run trains past a certain station without stopping: Hood v. North East. R'y, L. R. 8 Eq. 666; 5 Ch. 525; Phillips v. Great West. R'y, L. R. 7 Ch. 409; Rigby v. Great West. R'y, 2 Phill. Ch. 44. Not to ring a certain bell: Martin v. Nulkin, 2 P. Wms. 266. By an author, not to write or publish a rival work: Barfield v. Nicholson, 2 Sim. & St. 1; Morris v. Colman, 18 Ves. 437. See also, as further illustrations, Wolfe v. Matthews, L. R. 21 Ch. Div. 194; Aspden v. Seddon, L. R. 10 Ch. 394; Gearns v. Baker, L. R. 10 Ch. 355; Catt v. Tourle, L. R. 4 Ch. 654; Leader v. Moody, L. R. 20 Eq. 145; Jones v. North, L. R. 19 Eq. 426; Pattisson v. Gilford, L. R. 18 Eq. 259, 262, 263; Warne v. Routledge, L. R. 18 Eq. 497; Fothergill v. Rowland. L. R. 17 Eq. 132; Telford v. Metrop. Bd. of Works, L. R. 13 Eq. 574; Feilden v. Slater, L. R. 7 Eq. 523; Peek v. Matthews, L. R. 3 Eq. 515; Dyke v. Taylor, 3 De Gex, F. & J. 467; Nicholson v. Rose, 4 De Gex & J. 10; Shrewsbury etc. R'y v. London etc. R'y, 3 Macn. & G. 70; Wagner v. Meety, 69 Mo. 150; Hall v. Wesster, 7 Mo. App. 56; Gold etc. Tel. Co. v. Todd, 17 Hun, 548; Gillis v. Hall, 2 Brewst. 342; Beckwith v. Howard, 6 R. I. 1; Manhattan etc. Co. v. Van Keuren, 23 N. J. Eq. 251; Haskell v. Wright, 23 N. J. Eq. 389; Parker v. Garrison, 61 Ill. 250; Frank v. Brunnemann, 8 W. Va. 462.

Contracts which are entirely affirmative in form and language may imply and include a negative, so that their violation may be restrained by injunction. In Hamilton v. Hector, L. R. 6 Ch. 701, a husband and wife had stipulated in a separation deed that the children should attend such schools as their father should choose, and should spend their holidays where the trustees should direct; the trustees directed that they should spend one half their holidays with their father, and the rest with their mother; the father was restrained by injunction from interfering with the children during the time they were to spend with their mother, in violation of his agreement. See also Drury v. Molins, 6 Ves. 328; Pratt v. Brett, 2 Madd. 62; Briggs v. Law, 4 Johns. Ch. 22; Marvine v. Drexel's Ex'rs, 68 Pa. St. 362.

[1] The general subject of suits against corporations, and their managing officers, based upon their trust relations, and their acts in violation thereof, has already been considered: *Ante,* §§ 1091–1096. In all such suits an injunction may be granted either as the sole remedy, or in connection with

poration, or to be a corporation officer, cannot, in general, be tested by means of an injunction, the improper or unlawful expulsion of a member from a voluntary association without good cause, or in violation of its by-laws, may be restrained by injunction. Between *Mortgagors and Mortgagees.*[2] Against *Public Officers.* An injunction will not be granted, in general, to restrain persons from

the remedies of rescission, cancellation, accounting, etc. In connection with the cases there cited, see also the following as illustrations: To restrain *ultra vires* acts: Lord Aukland v. Westminster Board, L. R. 7 Ch. 597; Metts v. Northern R'y, L. R. 5 Ch. 621; Pudsey Gas Co. v. Corporation of Bradford, L. R. 15 Eq. 167; Pickering v. Stephenson, L. R. 14 Eq. 322; Kernaghan v. Williams, L. R. 6 Eq. 228; London etc. R'y v. London etc. R'y, 4 De Gex & J. 362; Ware v. Regent's Canal Co., 3 De Gex & J. 212; Rogers v. Oxford etc. R'y, 2 De Gex & J. 662; Hodgson v. Earl of Powis, 1 De Gex, M. & G. 6; Cohen v. Wilkinson, 1 Macn. & G. 481; Platteville v. Galena etc. R. R., 43 Wis. 493. To restrain unlawful acts of directors or managing officers in violation of their fiduciary duties: Cannon v. Trask, L. R. 20 Eq. 669; Dowling v. Pontypool etc. R'y, L. R. 18 Eq. 714; Featherstone v. Cooke, L. R. 16 Eq. 298; Mair v. Himalaya Tea Co., L. R. 1 Eq. 411; Carlisle v. South East. R'y, 1 Macn. & G. 689 (to restrain payment of dividends); Pond v. Vt. Valley R. R., 12 Blatchf. 280; Webb v. Ridgely, 38 Md. 364 (to restrain a fraudulent transferee of stock from voting). To restrain the minority of a religious corporation from interfering with the control of the majority: Cooper v. Gordon, L. R. 8 Eq. 249; Perry v. Shipway, 4 De Gex & J. 353. To restrain a corporation from committing a trespass: Eversfield v. Mid-Sussex R'y, 3 De Gex & J. 286; and see cases *post*, under head of Trespass. To restrain the expulsion of a member from a club or society: Labouchere v. Earl of Wharncliffe, L. R. 13 Ch. Div. 346; Fisher v. Keane, L. R. 11 Ch. Div. 353; Fisher v. Board of Trade, 80 Ill. 85; Gregg v. Mass. Med. Soc., 111 Mass. 185; 15 Am. Rep. 24; Lowry v. Read, 3 Brewst. 452. As to the use of an injunction to restrain a person from being, or from acting as, an officer of a corporation, see Aslatt v. Corpor. of Southampton, L. R. 16 Ch. Div. 143; Hussey v. Gallagher, 61 Ga. 86. See also, in general, Cromford etc. R'y v. Stockport etc. R'y, 1 De Gex & J. 326; Aurora etc. R. R. v. Lawrenceburgh, 56 Ind. 80.

2 To restrain mortgagee from improper sale under a power of sale, by advertisement, etc.: Capehart v. Biggs, 77 N. C. 261; Purnell v. Vaughan, 77 N. C. 268; Haggerson v. Phillips, 37 Wis. 364; Collins v. Lamport, 4 De Gex, J. & S. 500. To restrain mortgagor from committing waste, under certain circumstances, or doing other acts to the property whereby the security would be imperiled: Bagnall v. Villar, L. R. 12 Ch. Div. 812 (cutting crops); Warner v. Jacob, L. R. 20 Ch. Div. 220; Truman v. Redgrave, L. R. 18 Ch. Div. 547; Mut. Life Ins. Co. v. Bigler, 79 N. Y. 568 (removing property); Taylor v. Collins, 51 Wis. 123 (same remedy on foreclosure of a land contract). See also cases cited *post*, under head of Waste.

acting as public officers;[3] but the illegal, unlawful, or improper acts of public officers may be restrained when they would produce irreparable injury, or create a cloud upon title, or when such remedy is necessary to prevent a multiplicity of suits.[4] To prevent a *Cloud upon Title.* The use of the injunction to prevent acts which would create a cloud upon title is governed by the same rules which control the

[3] The legal remedy is, in general, adequate to test the right to a public office: Campbell v. Taggart, 10 Phila. 443; Jones v. Comm'rs of Granville, 77 N. C. 280; Sneed v. Bullock, 77 N. C. 282; Stone v. Wetmore, 42 Ga. 601; Sanders v. Metcalf, 1 Tenn. Ch. 419 (no injunction to restrain a judge from acting).

[4] To restrain the imposition or enforcement of illegal taxes and other public burdens, at the suit of taxpayers: See *ante*, vol. 1, §§ 259, 260, 265, 266, where this subject is fully discussed, and the conflicting results of decisions in different states are formulated. In addition to the cases there cited, see Wagner v. Meety, 69 Mo. 150; Curtenius v. Grand Rapids etc. R. R., 37 Mich. 583; Cattell v. Lowry, 45 Iowa, 478; Albany etc. Min. Co. v. Auditor-General, 37 Mich. 391; Sinclair v. Comm'rs of Winona Co., 23 Minn. 404; 23 Am. Rep. 694; South Platte Land Co. v. Comm'rs of Buffalo County, 7 Neb. 253; Burlington etc. R. R. v. Comm'rs of York County, 7 Neb. 487; George v. Dean, 47 Tex. 73; Douglass v. Harrisville, 9 W. Va. 162; 27 Am. Rep. 548; Marsh v. Supervisors of Clark County, 42 Wis. 502; Schettler v. Fort Howard, 43 Wis. 48; Hagaman v. Comm'rs of Cloud County, 19 Kan. 394; Worthen v. Badgett, 32 Ark. 496; New Orleans etc. R. R. v. Dunn, 51 Ala. 128; Wells v. Dayton, 11 Nev. 161; Union Pacific R. R. v. Lincoln Co., 3 Dill. 300; Brown v. Concord, 56 N. H. 375; Savings Bank v. Portsmouth, 52 N. H. 17. To restrain the sale of land under an illegal tax or assessment: Kean v. Asch, 27 N. J. Eq. 57; Oliver v. Memphis etc. R. R., 30 Ark. 128 (a sale of a railroad); Deming v. James, 72 Ill. 78 (a sale of personal property not subject to tax); Abbott v. Edgerton, 53 Ind. 196 (same); Trowbridge v. Horan, 78 N. Y. 439. Instances of injunction refused: Against election officers: Roudanez v. New Orleans, 29 La. Ann. 271; Harris v. Schryock, 82 Ill. 119; Hardesty v. Taft, 23 Md. 512; 87 Am. Dec. 584. Against a city exercising legislative powers: Chicago v. Wright, 69 Ill. 318; and see Des Moines Gas Co. v. Des Moines, 44 Iowa, 505; 24 Am. Rep. 756; Hugg v. Camden, 29 N. J. Eq. 6; Brown v. Catlettsburg, 11 Bush, 435; People v. Canal Board, 55 N. Y. 390; Kelly v. Baltimore, 53 Md. 134. Miscellaneous instances in which an injunction has been granted: To prevent the removal of a public schoolhouse: District etc. of Lodomillo v. District etc. of Cass, 54 Iowa, 115; or the removal of a county seat: Stuart v. Bair, 8 Baxt. 141. To prevent taking of private property for public use without compensation: Folley v. Passaic, 26 N. J. Eq. 216; and see Tribune Ass'n v. Sun etc. Ass'n, 7 Hun, 175; Dairiese v. Cooke, 91 U. S. 580; Lewis v. Providence, 10 R. I. 97; People v. Chicago, 53 Ill. 424.

remedy of removing a cloud from title.[5] To protect *Married Women's* property.[6] In controversies between *Partners,* and in other special cases.[7]

SECTION II.

TO PREVENT OR RESTRAIN THE COMMISSION OF TORTS.

ANALYSIS.

§ 1346. The estates and interests generally legal.
§ 1347. Kinds and classes of torts restrained.
§ 1348. Waste.
§ 1349. Nuisance: Public.
§ 1350. Nuisance: Private; when restrained.
§ 1351. Same: Instances; violations of easements.
§ 1352. Patent rights and copyrights.
§ 1353. Literary property as distinct from copyright.
§ 1354. Trade-marks.
§ 1355. Good-will.
§ 1356. Trespasses.
§ 1357. General doctrine; cases in which trespass may be enjoined.
§ 1358. Slander of title; libels; wrongful use of name.

§ 1346. The Estates and Interests Generally Legal.— The estates, interests, and primary rights to be secured by injunctions of this kind are in most instances legal; and the injunctions themselves, as a class, are frequently described as those for the protection of legal rights and

[5] See *post, Removing Cloud,* and cases there cited; Lehman v. Roberts, 86 N. Y. 232; Strusburgh v. New York, 87 N. Y. 452; Dederer v. Voorhies, 81 N. Y. 154; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474.

[6] An injunction may be needed for this purpose; as, for example, to restrain the sale of her property for her husband's debts when her title is clear, but not unless it *is* clear: Allen v. Benners, 10 Phila. 10; Simson v. Bates, 10 Phila. 66; to prevent the collection of a mortgage assigned by a wife, when the assignment was void: French v. Snell, 29 N. J. Eq. 95.

[7] In settlement of partnership affairs after a dissolution: Large v. Ditmars, 27 N. J. Eq. 283. Special cases: When to restrain arbitration: Pickering v. Cape Town R'y, L. R. 1 Eq. 84; to prevent injury to the property of a foreign monarch, restraining the publication of spurious securities of the foreign government: Emperor of Austria v. Day, 3 De Gex, F. & J. 217; to prevent a person from taking letters from the post-office for fraudulent purposes: Zellenkoff v. Collins, 23 Hun, 156; and see Guion v. Trask, 1 De Gex, F. & J. 373.

interests. So far as they do thus sustain and enforce legal rights, they are, of course, supplementary to or in lieu of the legal remedies which courts of common law originally gave, and perhaps now give, by action, under the same circumstances. For this reason, the general test as stated in a former paragraph applies with special force. The inadequacy of the legal remedies is the criterion which determines the exercise of this preventive jurisdiction; and the criterion is enforced, especially by the American courts, with great strictness.

§ 1347. **Kinds and Classes of Torts Restrained.**—The legal remedy is ordinarily considered as adequate in cases of torts to the person, and to property held by a legal title, and equity does not interfere.[1] There are, however, certain species of torts, in respect to each of which, as a class, it is settled that the legal remedy is generally inadequate, so that equity will generally interfere to prevent the wrong by injunction. There are other species of torts, in respect to each of which, as a class, the legal remedy is adequate, but may become inadequate, in individual instances, from their particular circumstances, so that in those instances an injunction will be granted. In the kind of torts for which the legal remedy is generally inadequate, so that an injunction is a proper remedy, the title of the injured party must be clear, the injury real, and not merely temporary or transient. They are waste, nuisance, including interference with easements, servitudes, and similar rights, infringements of patent rights, of copyrights, of trademarks, and of other intangible property rights, the pecuniary value of which cannot be certainly estimated, such as literary property in manuscript writings and good-will.

[1] Injunction never granted to restrain criminal acts: Phillips v. Stone Mountain, 61 Ga. 386; Life Ass'n v. Boogher, 3 Mo. App. 173; nor arrests: Davis v. Am. Soc., 6 Daly, 81; 75 N. Y. 362; Cohen v. Comm'rs of Goldsboro, 77 N. C. 2. No preliminary injunction will be granted while the plaintiff's legal right is really doubtful and unsettled: Nat. Docks R. R. v. Central R. R., 32 N. J. Eq. 755; overruling Cent. R. R. v. Pa. R. R., 31 N. J. Eq. 475.

In ordinary trespasses the injured party is left to his remedy of damages, but the circumstances of a trespass to property — especially to real property — may be such that the compensatory remedy is inadequate, and a court of equity will prevent the wrong by injunction.

§ 1348. Waste.— Waste is the destruction or improper deterioration or material alteration of things forming an essential part of the inheritance, done or suffered by a person rightfully in possession by virtue of a temporary or partial estate,— as, for example, a tenant for life or for years. The rightful possession of the wrong-doer is essential, and constitutes a material distinction between waste and trespass.[1] The remedy by injunction is fully established, and has not only virtually superseded the old common-law " action of waste," but has to a great extent taken the place of the " action on the case " for damages. An injunction will be granted in all cases where a legal action would lie to recover possession of the land wasted, or to recover damages.[2] It will also be granted in many instances where no legal action can be maintained, although the interest of the injured party is legal;[3] and where the

[1] Many acts are not waste in this country which would be waste in England, such as cutting timber, and modes of using the soil, when done in accordance with the usual methods of good husbandry in the neighborhood: See Drown v. Smith, 52 Me. 141; Keeler v. Eastman, 11 Vt. 293; Gardiner v. Dering, 1 Paige, 573; Livingston v. Reynolds, 26 Wend. 115; Morehouse v. Cotheal, 22 N. J. Eq. 521; Lynn's Appeal, 31 Pa. St. 44; 72 Am. Dec. 721; McCullough v. Irvine, 13 Pa. St. 438; Crawley v. Timberlake, 2 Ired. Eq. 460; Alexander v. Fisher, 7 Ala. 514.

[2] Pulteney v. Shelton, 5 Ves. 260, note; Twort v. Twort, 16 Ves. 128; Hole v. Thomas, 7 Ves. 589; Smallman v. Onions, 3 Brown Ch. 621; Powys v. Blagrave, 4 De Gex, M. & G. 448; Kekewich v. Marker, 3 Macn. & G. 311; Hawley v. Clowes, 2 Johns. Ch. 122; Kane v. Vanderburgh, 1 Johns. Ch. 11; Watson v. Hunter, 5 Johns. Ch. 169; 9 Am. Dec. 295; Duvall v. Waters, 1 Bland, 569, 576; 18 Am. Dec. 350; Hill v. Bowie, 1 Bland, 593; Markham v. Howell, 33 Ga. 508; Peak v. Hayden, 3 Bush, 125; Northrup v. Trask, 39 Wis. 515; Mut. L. Ins. Co. v. Bigler, 79 N. Y. 568; Vandemark v. Schoonmaker, 9 Hun, 16; Williams v. Peabody, 8 Hun, 271; Le Roy v. Wright, 4 Saw. 530 (plaintiff's legal title disputed).

[3] Garth v. Cotton, 1 Ves. Sr. 524, 556; 1 Dick. 183; 1 Lead. Cas. Eq., 4th Am. ed., 955; Perrot v. Perrot, 3 Atk. 94; Robinson v. Litton, 3 Atk. 209;

estate of the injured party is wholly equitable;[4] and where the waste itself is entirely "equitable," — that is, where, by the terms of the will, deed, settlement, or lease, the tenant holds the land "without impeachment of waste."[5] An injunction will also be granted to restrain threatened waste, although none has actually been committed.[6]

§ 1349. Nuisance — Public.— A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the attorney-general in England, and at the suit of the state, or the people, or municipality, or some proper officer representing the common-

Farrant v. Lovel, 3 Atk. 723; Davis v. Leo, 6 Ves. 784, 787; Onslow v. ———, 16 Ves. 173; Pratt v. Brett, 2 Madd. 62; Clement v. Wheeler, 25 N. H. 361; Attaquin v. Fish, 5 Met. 140, 147; Kane v. Vanderburgh, 1 Johns. Ch. 11, 12; Douglass v. Wiggins, 1 Johns. Ch. 435; Kidd v. Dennison, 6 Barb. 10, 15; Sarles v. Sarles, 3 Sand. Ch. 601; Ware v. Ware, 6 N. J. Eq. 117; Duvall v. Waters, 1 Bland, 569, 576; 18 Am. Dec. 350; Lewis v. Christian, 40 Ga. 187; Smith v. Rome, 19 Ga. 89; Lyon v. Hunt, 11 Ala. 295, 305; 46 Am. Dec. 216.

[4] Garth v. Cotton, 1 Ves. Sr. 524, 556; 1 Dick. 183; 1 Lead. Cas. Eq. 955; Robinson v. Litton, 3 Atk. 209; Farrant v. Lovel, 3 Atk. 723; Stansfield v. Habergham, 10 Ves. 273, 277; Humphreys v. Harrison, 1 Jacob & W. 581; Wallington v. Taylor, 1 N. J. Eq. 314, 318; Brashear v. Macey, 3 J. J. Marsh. 89. At the suit of the vendee against the vendor under a land contract: Smith and Fleek's Appeal, 69 Pa. St. 474. Between mortgagee and mortgagor, to restrain waste of the mortgaged premises: Brady v. Waldron, 2 Johns. Ch. 148; Robinson v. Preswick, 3 Edw. Ch. 246; Ensign v. Colburn, 11 Paige, 503; Phœnix v. Clark, 6 N. J. Eq. 447; Nelson v. Pinegar, 30 Ill. 473; Bunker v. Locke, 15 Wis. 635; Robinson v. Russell, 24 Cal. 467; Cooper v. Davis, 15 Conn. 556; State v. North, etc. R'y, 18 Md. 193; Parsons v. Hughes, 12 Md. 1; and in other cases of injuries analogous to waste: Litka v. Wilcox, 39 Mich. 94; Patton v. Moore, 16 W. Va. 428; 37 Am. Rep. 789; Frank v. Brunnemann, 8 W. Va. 462.

[5] Garth v. Cotton, *supra;* Vane v. Lord Barnard, 2 Vern. 738; Prec. Ch. 454; Rolt v. Lord Somerville, 2 Eq. Cas. Abr. 759; Aston v. Aston, 1 Ves. Sr. 264; Burges v. Lamb, 16 Ves. 174, 185; Day v. Merry, 16 Ves. 375; Abrahall v. Bubb, 2 Swanst. 172; Morris v. Morris, 15 Sim. 505; Wellesley v. Wellesley, 6 Sim. 497; Micklethwait v. Micklethwait, 1 De Gex & J. 504, 519; Kekewich v. Marker, 3 Macn. & G. 311; Att'y-Gen. v. Duke of Marlborough, 3 Madd. 498, 538; Sowerby v. Fryer, L. R. 8 Eq. 417; Birch-Wolfe v. Birch, L. R. 9 Eq. 683; Bubb v. Yelverton, L. R. 10 Eq. 465; Clement v. Wheeler, 25 N. H. 361.

[6] Rodgers v. Rodgers, 11 Barb. 595; Duvall v. Waters, 1 Bland, 569, 576; 18 Am. Dec. 350; Loudon v. Warfield, 5 J. J. Marsh. 196; White Water etc. Co. v. Comegys, 2 Ind. 469.

wealth, in this country. A public nuisance must be established by clear evidence, before the preventive remedy will be granted.[1] A public nuisance will also be restrained at the suit of a private person who suffers therefrom a special and particular injury distinct from that suffered by him in common with the public at large; but this injury must be real, and such that the legal remedy of damages would not be adequate.[2]

§ 1350. Private Nuisance — When Restrained.— It is a well-settled doctrine that equity will restrain a private nuisance at the suit of the injured party. This remedy will not, however, be granted in every instance of alleged

1 Att'y-Gen. v. Cleaver, 18 Ves. 211, 217; Att'y-Gen. v. Forbes, 2 Mylne & C. 123; Earl of Ripon v. Hobart, 3 Mylne & K. 169, 179; Att'y-Gen. v. Great East. R'y, L. R. 6 Ch. 572; Att'y-Gen. v. Eau Claire, 37 Wis. 400; State v. Eau Claire, 40 Wis. 533; Rochester v. Erickson, 46 Barb. 92; Coast Line R. R. v. Cohen, 50 Ga. 451; Pennsylvania v. Wheeling etc. Bridge Co., 13 How. 518; Miss. & Mo. R. R. v. Ward, 2 Black, 485; Att'y-Gen. v. Cohoes Co., 6 Paige, 133; 29 Am. Dec. 755; Mohawk Bridge Co. v. Utica etc. R. R., 6 Paige, 554; People v. Third Ave. R. R., 45 Barb. 63; Hinchman v. Paterson etc. R. R., 17 N. J. Eq. 75; 86 Am. Dec. 252; Craig v. People, 47 Ill. 487.

2 Soltau v. De Held, 2 Sim., N. S., 133; Att'y-Gen. v. Sheffield Gas Co., 3 De Gex, M. & G. 304; Att'y-Gen. v. Cambridge Gas Co., L. R. 4 Ch. 71, 80; Att'y-Gen. v. Gee, L. R. 10 Eq. 131; Original Hartlepool etc. Co. v. Gibb, L. R. 5 Ch. Div. 713; Pettibone v. Hamilton, 40 Wis. 402; Coast Line R. R. v. Cohen, 50 Ga. 451; Thayer v. New Bedford R. R., 125 Mass. 253; Osborne v. Brooklyn etc. R. R., 5 Blatchf. 366; Hartshorn v. South Reading, 3 Allen, 501; Central Bridge Corp. v. Lowell, 4 Gray, 474; Rowe v. Granite Bridge Corp., 21 Pick. 344; Bigelow v. Hartford Bridge Co., 14 Conn. 565; 36 Am. Dec. 502; Frink v. Lawrence, 20 Conn. 117; 50 Am. Dec. 274; Milhau v. Sharp, 27 N. Y. 611; 84 Am. Dec. 314; Knox v. New York, 55 Barb. 404; Smith v. Lockwood, 13 Barb. 209; Mayor etc. v. Baumberger, 7 Rob. (N. Y.) 219; Hudson River R. R. v. Loeb, 7 Rob. (N. Y.) 418; Manhattan etc. Co. v. Barker, 7 Rob. (N. Y.) 523; Peck v. Elder, 3 Sand. 126; Corning v. Lowerre, 6 Johns. Ch. 439; Sparhawk v. Union Pass. R'y, 54 Pa. St. 401; Black v. Phila. etc. R. R., 58 Pa. St. 249; Philadelphia v. Collins, 68 Pa. St. 106; Buck Mt. etc. Co. v. Lehigh etc. Co., 50 Pa. St. 91, 99; 88 Am. Dec. 534; Higbee v. Camden etc. R. R., 19 N. J. Eq. 276; Allen v. Board of Freeholders, 13 N. J. Eq. 68, 74; Zabriskie v. Jersey City etc. R. R., 13 N. J. Eq. 314; Delaware etc. R. R. v. Stump, 8 Gill & J. 479; 29 Am. Dec. 561; Hamilton v. Whitridge, 11 Md. 128; 69 Am. Dec. 184; Savannah etc. R. R. v. Shiels, 33 Ga. 601; Columbus v. Jaques, 30 Ga. 506; Green v. Oakes, 17 Ill. 249; Smith v. Bangs, 15 Ill. 399; Ewell v. Greenwood, 26 Iowa. 377; Sheboygan v. Sheboygan etc. R. R., 21 Wis. 667.

nuisance. The present or threatened injury must be real, not trifling, transient, or temporary; it must be one for which, either on account of its essentially irreparable nature, or its repetition or continuance, the legal remedy of damages is inadequate. The title of the plaintiff must also be clear, or at least not subject to any substantial doubt or question. The equitable jurisdiction is therefore based upon the notion of restraining irreparable mischief, or of preventing vexatious litigation, or a multiplicity of suits.[1]

[1] According to the modern decisions, a *mere* denial of the plaintiff's title in defendant's pleading will not prevent an injunction; but if the plaintiff's title is really disputed, or is in any real doubt, it must first be established by a verdict, before equity will interfere with its preventive relief: Att'y-Gen. v. Nichol, 16 Ves. 338, 342; Wynstanley v. Lee, 2 Swanst. 333, 335; Fishmongers' Co. v. East India Co., 1 Dick. 163; Blakemore v. Glamorganshire Canal Navigation, 1 Mylne & K. 154; Squire v. Campbell, 1 Mylne & C. 459, 465, 467; Taylor v. Davis, 3 Beav. 388, note; Whittaker v. Howe, 3 Beav. 383, 387, 395, note; Spencer v. London etc. R'y, 8 Sim. 193; Soltau v. De Held, 2 Sim., N. S., 133; Wood v. Sutcliffe, 2 Sim., N. S., 163; Walter v. Selfe, 4 De Gex & S. 315; Bostock v. North Staffordshire R'y, 5 De Gex & S. 584; St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642; Broadbent v. Imperial Gas Co., 7 De Gex, M. & G. 436, 461, 462; 7 H. L. Cas. 600; Att'y-Gen. v. Sheffield Gas etc. Co., 3 De Gex, M. & G. 304; Crossley v. Lightowler, L. R. 2 Ch. 478; Robson v. Whittingham, L. R. 1 Ch. 442; Att'y-Gen. v. Cambridge etc. Gas Co., L. R. 4 Ch. 71; Goodson v. Richardson, L. R. 9 Ch. 221, 223, 226; Stanford v. Hurlstone, L. R. 9 Ch. 116, 118, 119; Inchbald v. Robinson, L. R. 4 Ch. 388, 395, 397; London etc. R'y v. Lancashire etc. R'y, L. R. 4 Eq. 174, 178; Mayor v. Cardiff Water Co., 4 De Gex & J. 596, 597–599; Elmhirst v. Spencer, 2 Macn. & G. 45, 50; Parker v. Winnipiseogee etc. Co., 2 Black, 545; Barnes v. Hathorn, 54 Me. 124; Coe v. Winnepiseogee etc. Co., 37 N. H. 254, 264; Eastman v. Amoskeag etc. Co., 47 N. H. 71; Burnham v. Kempton, 44 N. H. 78, 90; Bassett v. Salisbury etc. Co., 47 N. H. 426; Wilcox v. Wheeler, 47 N. H. 488; Wesson v. Washburn Iron Co., 13 Allen, 95; 90 Am. Dec. 181; Rhode Island etc. Bank v. Hawkins, 6 R. I. 198; Falls Village etc. Co. v. Tibbetts, 31 Conn. 165; Fish v. Dodge, 4 Denio, 311; 47 Am. Dec. 254; Catlin v. Valentine, 9 Paige, 575; 38 Am. Dec. 567; Brady v. Weeks, 3 Barb. 157; Auburn etc. Co. v. Douglass, 12 Barb. 553; Niagara Falls etc. Co. v. Great Western R'y, 39 Barb. 212; Gilbert v. Mickle, 4 Sand. Ch. 357; Peck v. Elder, 3 Sand. 126; Cleveland v. City Gas Light Co., 20 N. J. Eq. 201; Ross v. Butler, 19 N. J. Eq. 294; 97 Am. Dec. 654; Davidson v. Isham, 9 N. J. Eq. 186; Wolcott v. Melick, 11 N. J. Eq. 204; 66 Am. Dec. 790; Smith v. Cummings, 2 Pars. Cas. 92; Cunningham v. Rome R. R., 27 Ga. 499; Cotton v. Miss. etc. Co., 19 Minn. 497; Carlisle v. Cooper, 21 N. J. Eq. 576, 579, 580, 583–585, 587; Att'y-Gen. v. Steward, 21 N. J. Eq. 340; 20 N. J. Eq. 415; Holsman v. Boiling Spring etc.

§ 1351. Same. Instances — Violations of Easements.— Among the nuisances, or wrongs in the nature of nuisances, which equity readily prevents by injunction are those which consist in the interference with, disturbance, or destruction, actual or threatened, of easements and servitudes, whether created by grant or by covenant, or resulting from user. Some of the most common forms of such injuries which equity enjoins are the obstruction of ancient lights in England, and rights of air or of prospect, by erections of any kind; the removal of the lateral support of land by excavations; the interference with water rights by diverting or polluting streams. In fact, every disturbance of an easement or servitude, existing or threatened, will be thus restrained, whenever from the essential nature of the injury, or from its continuous character, the legal remedy is inadequate.[1] No sufficient notion can be ob-

Co., 14 N. J. Eq. 335, 342–345; Shimer v. Morris C. Co., 27 N. J. Eq. 363; Nat. Docks R'y v. Central R. R., 32 N. J. Eq. 755; Central R. R. v. Pa. R. R., 31 N. J. Eq. 475; Le Roy v. Wright. 4 Saw. 530; Perry v. Parker, 1 Wood. & M. 280, 282; Hart v. Mayor etc. of Albany, 3 Paige, 213; Tuolumne Water Co. v. Chapman, 8 Cal. 392; Hicks v. Michael, 15 Cal. 107, 116; Levaroni v. Miller, 34 Cal. 231; 91 Am. Dec. 692; Olmsted v. Loomis, 9 N. Y. 423; Hacker v. Barton, 84 Ill. 313; Robinson v. Baugh, 31 Mich. 290.

[1] The jurisdiction, where equitable servitudes have been impressed upon land by covenants in deeds of conveyance, etc., has already been examined: See *ante*, § 1342.

Interfering with easement of light and air: Att'y-Gen. v. Nichol, 16 Ves. 338; Wynstanley v. Lee, 2 Swanst. 333; Back v. Stacy, 2 Russ. 121; Tapling v. Jones, 11 H. L. Cas. 290; Aynsley v. Glover, L. R. 10 Ch. 283; Hackett v. Baiss, L. R. 20 Eq. 494; Smith v. Smith, L. R. 20 Eq. 500; Ecclesiastical Comm'rs v. Kino, L. R. 14 Ch. Div. 213; Thruston v. Minke, 32 Md. 487; Robeson v. Pittenger, 2 N. J. Eq. 57; 32 Am. Dec. 412; Irwin v. Dixion, 9 How. 10.

Removal of lateral support of land: Hunt v. Peake, Johns. 705; 6 Jur., N. S., 1071.

Interfering with water rights by diverting streams, polluting streams, etc.: The cases on this subject are very numerous. The jurisdiction is exercised alike against private persons and against public bodies, municipalities, boards, commissioners, etc.: Lane v. Newdigate, 10 Ves. 192; Chalk v. Wyatt, 3 Mer. 688; Att'y-Gen. v. Birmingham, 4 Kay & J. 528; Wood v. Sutcliffe, 2 Sim., N. S., 163; Lingwood v. Stowmarket Co., L. R. 1 Eq. 77, 336; Att'y-Gen. v. Richmond, L. R. 2 Eq. 306; Goldsmid v. Tunbridge etc. Comm'rs, L. R. 1 Ch. 349; 1 Eq. 161; Clowes v. Staffordshire etc. Co., L. R. 8 Ch. 125; Att'y-Gen. v. Guardians, L. R. 20 Ch. Div. 595, 604–610;

tained of the scope and efficiency of this injunctive jurisdiction, except from an actual examination of the numer-

Metropolitan Board v. London etc. R'y, L. R. 17 Ch. Div. 246; Att'y-Gen. v. Birmingham Board, L. R. 17 Ch. Div. 685, 691; Pugh v. Golden V. R'y, L. R. 15 Ch. Div. 330; Glassop v. Heston etc. Board, L. R. 12 Ch. Div. 102, 109; Newington etc. Board v. Cottingham etc. Board, 12 Ch. Div. 725, 734; West Cumberland etc. Co. v. Kenyon, L. R. 11 Ch. Div. 782; 6 Ch. Div. 773; Taylor v. Corporation of St. Helens, L. R. 6 Ch. Div. 264; Flower v. Local Board etc., L. R. 5 Ch. Div. 347, 352; Pennington v. Brinsopp etc. Co., L. R. 5 Ch. Div. 769; Att'y-Gen. v. Great East. R'y, L. R. 6 Ch. 572; Att'y-Gen. v. Leeds Corporation, L. R. 5 Ch. 583; Att'y-Gen. v. Colney Hatch etc. Asylum, L. R. 4 Ch. 146; Baxendale v. McMurray, L. R. 2 Ch. 790; Crossley v. Lightowler, L. R. 2 Ch. 478; Nuneaton L. Board v. General Sewage Co., L. R. 20 Eq. 127; Compton v. Lea, L. R. 19 Eq. 115, 121; Holt v. Corporation of Rochdale, L. R. 10 Eq. 354, 361; Carlisle v. Cooper, 21 N. J. Eq. 568, 579, 583, 585; Att'y-Gen. v. Steward, 21 N. J. Eq. 340; 20 N. J. Eq. 415; Shimer v. Morris Canal Co., 27 N. J. Eq. 363; Holsman v. Boiling Spring etc. Co., 14 N. J. Eq. 335; Jacobs v. Allard, 42 Vt. 303; 1 Am. Rep. 331; Bull v. Valley Falls Co., 8 R. I. 42; Frink v. Lawrence, 20 Conn. 117; 50 Am. Dec. 274; Fisk v. Wilber, 7 Barb. 395; Pollitt v. Long, 58 Barb. 20; Olmsted v. Loomis, 6 Barb. 152; Gardner v. Newburgh, 2 Johns. Ch. 162, 165; 7 Am. Dec. 526; Van Bergen v. Van Bergen, 2 Johns. Ch. 272; 3 Johns. Ch. 282; 8 Am. Dec. 511; Reid v. Gifford, Hopk. Ch. 416; Hammond v. Fuller, 1 Paige, 197; Arthur v. Case, 1 Paige, 447; Belknap v. Trimble, 3 Paige, 577, 600; Babcock v. New Jersey etc. Co., 20 N. J. Eq. 296; Spangler's Appeal, 64 Pa. St. 387; Sanderson v. Pennsylvania Coal Co., 86 Pa. St. 401; 27 Am. Rep. 711; Lewis v. Stein, 16 Ala. 214; 50 Am. Dec. 177; Burden v. Stein, 27 Ala. 104; 62 Am. Dec. 758.

The California reports are so rich in most instructive cases that I may properly cite freely from them: Fitzgerald v. Urton, 5 Cal. 308; Burdge v. Underwood, 6 Cal. 45; Tenney v. Miners' D. Co., 7 Cal. 335; Tuolumne W. Co. v. Chapman, 8 Cal. 392; Weimer v. Lowery, 11 Cal. 104; Boggs v. Merced M. Co., 14 Cal. 279, 379; Henshaw v. Clark, 14 Cal. 460; Hicks v. Michael, 15 Cal. 107; Weaver v. Eureka Lake Co., 15 Cal. 271; Hicks v. Compton, 18 Cal. 206; Bensley v. Mt. Lake W. Co., 13 Cal. 306; 73 Am. Dec. 575; Logan v. Driscoll, 19 Cal. 623; 81 Am. Dec. 90; McLaughlin v. Kelly, 22 Cal. 212; Kittle v. Pfeiffer, 22 Cal. 484; Rupley v. Welch, 23 Cal. 452; Robinson v. Russell, 24 Cal. 467; Wixon v. Bear River etc. Co., 24 Cal. 367; 85 Am. Dec. 69; Leach v. Day, 27 Cal. 643; Ferrea v. Knipe. 28 Cal. 340; 87 Am. Dec. 128; Grigsby v. Burtnett, 31 Cal. 406; More v. Massini, 32 Cal. 590; Hill v. Smith, 32 Cal. 166; Levaroni v. Miller, 34 Cal. 231; 91 Am. Dec. 692; Yolo Co. v. Sacramento, 36 Cal. 193; Grigsby v. Clear Lake W. Co., 40 Cal. 396; Gregory v. Nelson, 41 Cal. 278; Cowell v. Martin, 43 Cal. 605; Cave v. Crafts, 53 Cal. 135; Robinson v. Black Diamond Coal Co., 50 Cal. 460; 57 Cal. 412; 40 Am. Rep. 118; and see the very important case of Woodruff v. North Bloomfield etc. M. Co., 8 Saw. 628, to enjoin several hydraulic mining companies from discharging their mining *débris* into a river, by which the lands of the adjoining proprietors

ous and varying instances in which it has been exercised by the modern decisions.

below were destroyed, and the navigation of the river was impeded. Several of these California cases are very instructive with respect to injunctions against trespass.

Miscellaneous examples — Encroachments upon public parks, squares, and the like: Corning v. Lowerre, 6 Johns. Ch. 439; Hills v. Miller, 3 Paige, 254; 24 Am. Dec. 218; Trustees of Watertown v. Cowen, 4 Paige, 510.

Corporations encroaching upon the rights of adjoining proprietors: Coats v. Clarence R'y, 1 Russ. & M. 181; Bonaparte v. Camden etc. R. R., Bald. 205, 231; Mohawk etc. R. R. v. Artcher, 6 Paige, 83; Drake v. Hudson River R. R., 7 Barb. 508; Att'y-Gen. v. Tudor Ice Co., 104 Mass. 239; 6 Am. Rep. 227; Morris etc. R. R. v. Prudden, 20 N. J. Eq. 530.

Disturbance of a burying-ground: Beatty v. Kurtz, 2 Pet. 566, 584.

Ringing of church bells: Soltau v. De Held, 2 Sim., N. S., 133.

Illustrations of various other nuisances: Vernon v. Vestry of St. James, L. R. 16 Ch. Div. 449; Hedley v. Bates, L. R. 13 Ch. Div. 498; Sturges v. Bridgman, L. R. 11 Ch. Div. 852; Theed v. Debenham, L. R. 2 Ch. Div. 165; Broder v. Saillard, L. R. 2 Ch. Div. 692; Umfreville v. Johnson, L. R. 10 Ch. 580; Goodson v. Richardson, L. R. 9 Ch. 221; Att'y-Gen. v. Terry, L. R. 9 Ch. 423; Ball v. Ray, L. R. 8 Ch. 467; Thorpe v. Brumfitt, L. R. 8 Ch. 650; Gaunt v. Fynney, L. R. 8 Ch. 8; Hext v. Gill, L. R. 7 Ch. 699; Staight v. Burn, L. R. 5 Ch. 163; Inchbald v. Robinson, L. R. 4 Ch. 388; Att'y-Gen. v. Mid-Kent R'y, L. R. 3 Ch. 100; Clarke v. Clark, L. R. 1 Ch. 16; Tipping v. St. Helen's etc. Co., L. R. 1 Ch. 66; Ivimey v. Stocker, L. R. 1 Ch. 396; Smith v. Smith, L. R. 20 Eq. 500; Fenwick v. East London R'y, L. R. 20 Eq. 544; Allen v. Martin, L. R. 20 Eq. 462; Mott v. Shoolbred, L. R. 20 Eq. 22; Dyers's Co. v. King, L. R. 9 Eq. 438; Walker v. Brewster, L. R. 5 Eq. 25; Beadel v. Perry, L. R. 3 Eq. 465; Crump v. Lambert, L. R. 3 Eq. 409; Martin v. Headon, L. R. 2 Eq. 425, 434; Dent v. Auction Mart Co., L. R. 2 Eq. 238, 244, 246, 247; Broadbent v. Imperial Gas Co., 7 De Gex, M. & G. 436, 460, 462; 7 H. L. Cas. 600; St. Helen's etc. Co. v. Tipping, 11 H. L. Cas. 642; Watson v. Sutherland, 5 Wall. 74; Parker v. Winnipiseogee etc. Co., 2 Black, 545; Cadigan v. Brown, 120 Mass. 493; Richmond Mfg. Co. v. Atlantic etc. Co., 10 R. I. 106; 14 Am. Rep. 658; Duncan v. Hayes, 22 N. J. Eq. 25; Meigs v. Lister, 23 N. J. Eq. 199; O'Riley v. McChesney, 3 Lans. 278; Snow v. Williams, 16 Hun, 468; Rothery v. N. Y. Rubber Co., 24 Hun, 172; Seaman v. Lee, 10 Hun, 607; Beach v. Elmira, 22 Hun, 158; Henderson v. N. Y. Cent. R. R., 78 N. Y. 423; Lynch v. Mayor etc., 76 N. Y. 60; 32 Am. Rep. 271; Adams v. Popham, 76 N. Y. 410; Campbell v. Seaman, 63 N. Y. 568; 20 Am. Rep. 567; Olmsted v. Loomis, 9 N. Y. 423; Davis v. Lambertson, 56 Barb. 480; Owen v. Phillips, 73 Ind. 284; Wahle v. Reinbach, 76 Ill. 322; Greene v. Nunnemacher, 36 Wis. 50; Pettibone v. Hamilton, 40 Wis. 402; Lewis v. Stein, 16 Ala. 214; 50 Am. Dec. 177; Ex parte Martin, 13 Ark. 198; 58 Am. Dec. 321; Lamborn v. Covington Co., 2 Md. Ch. 409.

It is only by examining a large number of decisions that any adequate notion can be obtained of the wide extent of this jurisdiction, as well as of

§ 1352. Patent Rights and Copyrights.— When the existence of a patent right or of a copyright is conceded, or has been established by an action at law, the jurisdiction of equity to restrain an infringement is too well settled and familiar to require the citation of authorities in its support. From the nature of the right and of the wrong,— the violation being a continuous act,— the legal remedy is necessarily inadequate. The ordinary form of relief is an accounting of profits and an injunction in equity; indeed, the action at law is seldom resorted to, except for the purpose of establishing the validity of the patent or copyright by the verdict of a jury when it is really contested. Under the constitution of the United States, the cognizance of suits for the infringement of these rights belongs exclusively to the federal courts.[1]

§ 1353. Literary Property as Distinct from Copyright.— In analogy to the protection of copyrights, a jurisdiction has become well established by modern decisions to restrain the invasion or piracy of literary property in the product of intellectual labor, which still remains in the form of manuscript, or which, if printed, has not been published, and over which, as a consequence, no statutory copyright has been obtained; and to restrain an invasion of the similar right which an artist has in his pictures, and other original works of his creative art. This jurisdiction belongs to the state courts. It will be exercised to restrain the unauthorized publication of *unpublished* manuscript or printed matter in violation of the rights of the person entitled thereto;[1] the unauthorized publication, perform-

its limitations. These cases show that the jurisdiction is not exercised merely in exceptional cases, as might be inferred from some judicial language.

§ 1352, [1] Hogg v. Kirby, 8 Ves. 215, 223; Nicol v. Stockdale, 3 Swanst. 687; Bacon v. Jones, 4 Mylne & C. 433, 436; Saunders v. Smith, 3 Mylne & C. 711, 728; Martin v. Wright, 6 Sim. 297. See Curtis on Patent and Copyrights, and Webster's Patent Cases.

§ 1353, [1] Duke of Queensberry v. Shebbeare, 2 Eden, 329; Pope v. Curl, 2 Atk. 342; Southey v. Sherwood, 2 Mer. 435, 437; Keene v. Wheatley, 9 Am. Law Reg. 33; Folsom v. Marsh, 2 Story, 100; Grigsby v. Breckenridge, 3 Bush, 480; 92 Am. Dec. 509.

ance, representation on the stage, or other similar uses of dramatic compositions which have not been "published" by the author or proprietor;[2] the unauthorized publication, delivery, or other like use of lectures which have been delivered by the author, but not otherwise published;[3] the unauthorized making, sale, or exhibition of copies of paintings, engravings, and other works of art, even though the originals may have been publicly exhibited;[4] and the unauthorized publication of private letters, whether on literary topics, or on matters of private business, friendship, or family.[5]

§ 1354. Trade-marks.—Somewhat akin to the protection of patent and copy rights is that which courts of equity give, by means of the injunction, to the peculiar species of right arising from the adoption and use of "trade-marks." Although some judicial opinions and some recent statutes speak of "property" in trade-marks, or call the right to their exclusive use a kind of property, yet in strictness the remedy does not depend upon any true *property* acquired in these symbols and names, but upon the broad principle that a court of equity will not permit fraud to be practiced upon the public nor upon private individuals.[1] It is well settled by modern decisions, that

[2] Keene v. Kimball, 16 Gray, 545; 77 Am. Dec. 426; Keene v. Clarke, 5 Rob. (N. Y.) 38; Palmer v. De Witt, 47 N. Y. 532; 7 Am. Rep. 480; 2 Sweeny, 530; 5 Abb. Pr., N. S., 130; Boucicault v. Fox, 5 Blatchf. 87; Keene v. Wheatley, 9 Am. Law Reg. 33; Crowe v. Aiken, 4 Am. Law Rev. 450.

[3] Abernethy v. Hutchinson, 1 Hall & T. 28, 40; 3 L. J. Ch. 209; Keene v. Kimball, 16 Gray, 545; 77 Am. Dec. 426, per Hoar, J.; Bartlett v. Crittenden, 4 McLean, 300.

[4] Prince Albert v. Strange, 1 Macn. & G. 25; 1 Hall & T. 1; 2 De Gex & S. 652; Turner v. Robinson, 10 Ir. Ch. 121, 510.

[5] The restraint may be at the suit of the writer against the person written to, or his assigns, or a stranger, or at the suit of the person written to, or his personal representatives against a stranger: Pope v. Curl, 2 Atk. 342; Gee v. Pritchard, 2 Swanst. 402; Thompson v. Stanhope, Amb. 737; Lord Perceval v. Phipps, 2 Ves. & B. 19, 24; Earl of Granard v. Dunkin, 1 Ball & B. 207; Folsom v. Marsh, 2 Story, 100, 113; Hoyt v. Mackenzie, 3 Barb. Ch. 320; Wetmore v. Scovell, 3 Edw. Ch. 515, 529; Woolsey v. Judd, 4 Duer, 379.

[1] The ground of the remedy was stated in Farina v. Silverlock, 6 De

when a trade-mark has been duly acquired by a manufacturer or dealer, an injunction will be granted at his suit to restrain other persons from using it upon their goods, or from using such imitations of it as will tend to mislead and deceive the public.[2] For a discussion of the numerous

Gex, M. & G. 214, 217: "This right cannot properly be described as a copyright; it is, in fact, a right which can be said to exist only, and can be tested only, by its violation; it is the right which any person designating his wares or commodities by a particular trade-mark, as it is called, has to prevent others from selling wares which are not his, marked with that trade-mark, in order to mislead the public, and so incidentally to injure the person who is owner of the trade-mark."

[2] Burgess v. Burgess, 3 De Gex, M. & G. 896; Rogers v. Nowill, 3 De Gex, M. & G. 614; Farina v. Silverlock, 6 De Gex, M. & G. 214; Edelsten v. Edelsten, 1 De Gex, J. & S. 185; Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523; 4 De Gex, J. & S. 137; Flavel v. Harrison, 10 Hare, 467; Holloway v. Holloway, 13 Beav. 209; Cocks v. Chandler, L. R. 11 Eq. 446; Marshall v. Ross, L. R. 8 Eq. 651; Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345; Radde v. Norman, L. R. 14 Eq. 348; Hirst v. Denham, L. R. 14 Eq. 542; Seixo v. Provezende, L. R. 1 Ch. 192; Lee v. Haley, L. R. 5 Ch. 155; Wotherspoon v. Currie, L. R. 5 H. L. 508; Perry v. Truefitt, 6 Beav. 66; Collins Co. v. Brown, 3 Kay & J. 423; Collins Co. v. Cowen, 3 Kay & J. 428; Singer Mfg. Co. v. Loog, L. R. 18 Ch. Div. 395; Hendriks v. Montagu, L. R. 17 Ch. Div. 638 (using a name); Orr Ewing v. Johnston, L. R. 13 Ch. Div. 434; Civil Service etc. Ass'n v. Dean, L. R. 13 Ch. Div. 512; Boulnois v. Peake, L. R. 13 Ch. Div. 513, note; Day v. Brownrigg, L. R. 10 Ch. Div. 294; Merch. Bank Co. v. Merch. Bank, L. R. 9 Ch. Div. 560 (using name); Seigert v. Findlater, L. R. 7 Ch. Div. 801; Linoleum Mfg. Co. v. Nairn, L. R. 7 Ch. Div. 834; Braham v. Beachim, L. R. 7 Ch. Div. 848; Moet v. Pickering, L. R. 6 Ch. Div. 770; Cheavin v. Walker, L. R. 5 Ch. Div. 850; Hirsch v. Jonas, L. R. 3 Ch. Div. 584; Singer Mfg. Co. v. Wilson, L. R. 2 Ch. Div. 434; Estcourt v. Estcourt etc. Co., L. R. 10 Ch. 276; Upmann v. Elkan, L. R. 7 Ch. 130; 12 Eq. 140; Ford v. Foster, L. R. 7 Ch. 611; Cope v. Evans, L. R. 18 Eq. 138; Raggett v. Findlater, L. R. 17 Eq. 29; James v. James, L. R. 13 Eq. 421; Hall v. Barrows, 4 De Gex, J. & S. 150; Coffeen v. Brunton, 5 McLean, 256; Canal Co. v. Clark, 13 Wall. 311; Ames v. King, 2 Gray, 379; Boardman v. Meriden Britannia Co., 35 Conn. 402; 95 Am. Dec. 270; Bradley v. Norton, 33 Conn. 157; 87 Am. Dec. 200; Congress etc. Spring Co. v. High Rock etc. Co., 45 N. Y. 291; 6 Am. Rep. 82; Smith v. Woodruff, 48 Barb. 438; Samuel v. Berger, 24 Barb. 163; Howard v. Henriques, 3 Sand. 725; Palmer v. Harris, 60 Pa. St. 156; 100 Am. Dec. 557; Rowley v. Houghton, 2 Brewst. 303; Dixon Crucible Co. v. Guggenheim, 2 Brewst. 321; McCartney v. Garnhart, 45 Mo. 593; 100 Am. Dec. 397; Filley v. Fassett, 44 Mo. 168; 100 Am. Dec. 275; Gillott v. Esterbrook, 48 N. Y. 374; 8 Am. Rep. 553; 47 Barb. 455; Godillot v. Harris, 81 N. Y. 263; Burnett v. Phalon, 3 Keyes, 594; Gillott v. Kettle, 3 Duer, 624; Amoskeag Mfg. Co.

questions concerning the nature and validity of trade-marks, who may acquire them, how they may be acquired, what imitations are wrongful, and the like, the reader must be referred to the special treatises upon the subject.

§ 1355. Good-will.— Another intangible kind of property which will be protected from invasion by injunction is "good-will." The peculiar right, or rather expectancy, called "good-will," assumes that a certain business has been established and carried on at some specific place. It consists in the probability, based upon the habits of men, that the persons who have been accustomed to deal with that business at that specific place, as well as others, will continue to come to such place and deal in the future. When such a business is transferred, the good-will may be assigned with it.[1] If a good-will is thus assigned with a business, interference with it by the assignor will generally be restrained by injunction.[2]

§ 1356. Trespasses.— At an early day the court of chancery refused to interfere and restrain any trespasses.

v. Spear, 2 Sand. 599; Lockwood v. Bostwick, 2 Daly, 521; Curtis v. Bryan, 2 Daly, 312; Fetridge v. Wells, 4 Abb. Pr. 144; Coats v. Holbrook, 2 Sand. Ch. 586; Taylor v. Carpenter, 2 Sand. Ch. 603; 11 Paige, 292; 42 Am. Dec. 114; Woodward v. Lazar, 21 Cal. 448; 82 Am. Dec. 751; Derringer v. Plate, 29 Cal. 292; 87 Am. Dec. 170; Falkinburg v. Lucy, 35 Cal. 52; 95 Am. Dec. 76; Choynski v. Cohen, 39 Cal. 501; 2 Am. Rep. 476; Burke v. Cassin, 45 Cal. 467; 13 Am. Rep. 204; Coffeen v. Brunton, 4 McLean, 516; Walton v. Crowley, 3 Blatchf. 440; Hostetter v. Vowinkle, 1 Dill. 329; Heath v. Wright, 3 Wall. Jr. 141; Taylor v. Carpenter, 3 Story, 458; 2 Wood. & M. 1; Moorman v. Hoge, 2 Saw. 78; Taylor v. Gillies, 59 N. Y. 331; 17 Am. Rep. 333; Gouraud v. Trust, 6 Thomp. & C. 133; 3 Hun, 627; Meneely v. Meneely, 3 Thomp. & C. 540; 1 Hun, 367.

[1] Independently of statute, a good-will by itself, without the business on which it depends, cannot be assigned: See Cal. Civ. Code, secs. 992, 993.

[2] When a person who had carried on a business at a certain locality transfers the business with its good-will, if he should set up the same business again so near the locality as to draw off the customers from the old place, this would be an infringement of the good-will. The legal remedy would be inadequate, for it would always be very difficult, if not impossible, to estimate the pecuniary damages upon any certain basis. The gist of the injury is undoubtedly the breach of an implied contract arising from the transfer; and often there is an express stipulation: See *ante*, under § 1344, cases concerning contracts in restraint of trade.

Lord Thurlow broke through this rule, and began to use the preventive relief against such wrongs. He was followed by Lord Eldon;[1] and the jurisdiction is now firmly established in its principles, although there is no little disagreement among the courts — and especially the American courts — in applying these principles.

§ 1357. General Doctrine — Cases in Which Trespass may be Enjoined.— If a trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere. The *principle* determining the jurisdiction embraces two classes of cases, and may be correctly formulated as follows: 1. If the trespass, although a single act, is or would be destructive, if the injury is or would be irreparable,— that is, if the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced, by means of compensation in money,— then the wrong will be prevented or stopped by injunction. 2. If the trespass is *continuous* in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act *if it stood alone,* then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions. In both cases the ultimate criterion is the inadequacy of the legal remedy.[1] All the cases, English and American, have

§ 1356, [1] See opinion of Lord Eldon in Thomas v. Oakley, 18 Ves. 184; Hanson v. Gardiner, 7 Ves. 305.

§ 1357, [1] The legal remedy is not adequate simply because a recovery of pecuniary damages is possible. It is only adequate when the injured party can, *by one action at law,* recover damages which constitute a complete and certain relief for the whole wrong, — a relief virtually as efficient as that given by a court of equity. This conclusion is sustained by the consensus of modern decisions of the highest authority; although it cannot be claimed that the cases are unanimous in its acceptance. The principle, so far as it applies to the first class of trespasses — those *essentially* destructive — was stated by Chancellor Kent in two leading cases, which may be regarded as

professed to adopt the inadequacy of legal remedies as the test and limit of the injunctive jurisdiction; but in applying this criterion, the modern decisions, with some exceptions among the American authorities, have certainly held the injury to be irreparable and the legal remedy inadequate in many instances and under many circumstances where Chancellor Kent would probably have refused to interfere. It is certain that many trespasses are now enjoined which, if committed, would fall far short of *destroying* the property, or of rendering its restoration to its original condition impossible. The injunction is granted, not merely because the injury is *essentially* destructive, but because, being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages.[2] While the same formula is employed

the counterparts of each other: Livingston v. Livingston, 6 Johns. Ch. 497, 499; 10 Am. Dec. 353; and Jerome v. Ross, 7 Johns. Ch. 315, 333; 11 Am. Dec. 484. In Livingston v. Livingston, he granted an injunction, citing and relying upon the following English cases, among others: Mitchell v. Dors, 6 Ves. 147; Hamilton v. Worsefold, cited 10 Ves. 290; Crockford v. Alexander, 15 Ves. 138; Twort v. Twort, 16 Ves. 128; Kinder v. Jones, 17 Ves. 110; Earl Cowper v. Baker, 17 Ves. 128; Gray v. Duke of Northumberland, 17 Ves. 281, and Thomas v. Oakley, 18 Ves. 184. In Jerome v. Ross, *supra*, he refused to enjoin canal commissioners, acting under color of a state statute, from quarrying a ledge of rocks on complainant's land, it not appearing that the stone had any market value, or that its removal would injure the freehold. He cited Stevens v. Beekman, 1 Johns. Ch. 318, and distinguished Gardner v. Newburgh, 2 Johns. Ch. 162, and Belknap v. Belknap, 2 Johns. Ch. 463. Whatever may be thought of the actual decision in Jerome v. Ross, it cannot be denied that the tendency of Chancellor Kent's opinion in narrowing the jurisdiction to the comparatively few trespasses of an extraordinary and specially aggravated nature is opposed to the modern decisions of the highest ability and authority.

[2] Illustrations: Injury to houses, fixtures, land, etc.: De Veney v. Gallagher, 20 N. J. Eq. 33; Witmer's Appeal, 45 Pa. St. 455; 84 Am. Dec. 505; Frederick v. Groshon, 30 Md. 436; 96 Am. Dec. 591; Ryan v. Brown, 18 Mich. 196; 100 Am. Dec. 154; Echelkamp v. Schrader, 45 Mo. 505. Injuring a party-wall: Phillips v. Bordman, 4 Allen, 147. Cutting off an aqueduct or water supply: Wilcox v. Wheeler, 47 N. H. 488; Wright v. Moore, 38 Ala. 593; 82 Am. Dec. 731; Pettigrew v. Evansville, 25 Wis. 223; 3 Am. Rep. 50. Obstructing a railroad, or access to it: London etc. R'y v. Lancashire etc. R'y, L. R. 4 Eq. 174; Clark v. Jeffersonville etc. R. R., 44 Ind. 248. Destroying trees, ornamental or timber: Sarles v. Sarles, 3 Sand. Ch. 601; Daubenspeck v. Grear, 18 Cal. 443. Excavating ore, coal,

by the courts of equity in defining their jurisdiction, the jurisdiction itself has practically been enlarged; judges have been brought to see and to acknowledge — contrary to the opinion held by Chancellor Kent — that the common-law theory of not *interfering* with persons until they shall have actually committed a wrong is fundamentally erroneous, and that a remedy which *prevents* a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess. The ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed. I have placed in the foot-note some illustrations of numerous particular cases in which the injunction has been granted, all depending upon their own circumstances, but all resting upon the same general principle, that the legal remedy of damages

stones, etc.: West Point Iron Co. v. Reymert, 45 N. Y. 703; Anderson v. Harvey's Heirs, 10 Gratt. 386; Merced etc. Co. v. Fremont, 7 Cal. 317; 68 Am. Dec. 262; Real Del Monte etc. Co. v. Pond etc. Co., 23 Cal. 82; More v. Massini, 32 Cal. 590. Diverting a stream from a mill: Corning v. Troy etc. Factory, 40 N. Y. 191. Continuous or repeated trespasses: Martyr v. Lawrence, 2 De Gex, J. & S. 261, 271; Allen v. Martin, L. R. 20 Eq. 462; Carpenter v. Gwynn, 35 Barb. 395; Musselman v. Marquis, 1 Bush, 463; 89 Am. Dec. 637.

Examples of cases where an injunction was *refused:* Smith v. Pettingill, 15 Vt. 82; 40 Am. Dec. 667; Attaquin v. Fish, 5 Met. 140, 147; Blake v. Brooklyn, 26 Barb. 301; Hart v. Albany, 9 Wend. 571; Southard v. Morris Canal Co., 1 N. J. Eq. 519, 521; Lutheran Church v. Maschop, 10 N. J. Eq. 57; Cross v. Morristown, 18 N. J. Eq. 305; Torrey v. Camden etc. R. R., 18 N. J. Eq. 293; Colwell v. Mays Landing etc. Co., 19 N. J. Eq. 245; Mulvany v. Kennedy, 26 Pa. St. 44; Georges Creek etc. Co. v. Detmold, 1 Md. Ch. 371; Duvall v. Waters, 1 Bland, 569, 577; 18 Am. Dec. 350; Davis v. Reed, 14 Md. 152; Cherry v. Stein, 11 Md. 1; Shipley v. Ritter, 7 Md. 408; 61 Am. Dec. 371; Gause v. Perkins, 3 Jones Eq. 177; 69 Am. Dec. 728; Scofield v. Van Bokkelen, 5 Jones Eq. 342; Thomas v. James, 32 Ala. 723; Lyon v. Hunt, 11 Ala. 295, 306; 46 Am. Dec. 216; Indianapolis etc. Co. v. Indianapolis, 29 Ind. 245; Blanchard v. Doering, 23 Wis. 200; Weigel v. Walsh, 45 Mo. 560. See also the following cases, illustrating, — 1. Trespasses which, though single, wrought great injury to property: and 2. Trespasses which were continuous: Powell v. Aiken, 4 Kay & J. 343, 355; Great North. etc. R'y v. Clarence R'y, 1 Coll. C. C. 507; Phillips v. Truby, 8

is not adequate, and the ends of justice require the relief of prevention in place of mere compensation.

§ 1358. Slander of Title — Libels — Wrongful Use of Name. — Partly by analogy with the restraint of trespasses, and partly by analogy with the restraint of that fraud upon the public and upon the proprietor which is involved in the use of counterfeited trade-marks, the English courts have, by recent decisions, exercised the injunctive jurisdiction to restrain injurious publications concerning property which operate as a slander of the owner's title, and libelous publications which are injurious to the plaintiff's business, trade, or profession, and the wrongful use of a name by which the public would be misled, and the plaintiff injured in his business.[1] This extension of the juris-

Jur., N. S., 999; Manchester etc. R'y v. Worksop Board of Health, 23 Beav. 198, 209; Corning v. Troy Iron and Nail Factory, 40 N. Y. 191, 205, 206; 39 Barb. 311, 319, 325–328; 34 Barb. 485, 491, 492; 6 How. Pr. 89; Davis v. Lambertson, 56 Barb. 480, 485; Niagara Falls etc. Co. v. Great W. R'y, 39 Barb. 212, 224. Further illustrations: Stannard v. Vestry of St. Giles, L. R. 20 Ch. Div. 190, 196; Strelley v. Pearson, L. R. 15 Ch. Div. 113, 116; Hall v. Byron, L. R. 4 Ch. Div. 667; Stanford v. Hurlstone, L. R. 9 Ch. 116; Hext v. Gill, L. R. 7 Ch. 699; Lord Auckland v. Westminster Board, L. R. 7 Ch. 597; London etc. R'y v. Lancashire etc. R'y, L. R. 4 Eq. 174; Bowser v. Maclean, 2 De Gex, F. & J. 415; Lloyd v. London etc. R'y, 2 De Gex, J. & S. 568, 578; Watson v. Sutherland, 5 Wall. 74; Chapman v. Toy Long, 4 Saw. 28; Patton v. Moore, 16 W. Va. 428; 37 Am. Rep. 789; Pierpont v. Harrisville, 9 W. Va. 215; West v. Smith, 52 Cal. 322; Gilman v. Sheboygan etc. R. R., 40 Wis. 653; Carpenter v. Grisham, 59 Mo. 247; Clark v. Jeffersonville etc. R. R., 44 Ind. 248; Folley v. Passaic, 26 N. J. Eq. 216; Southmayd v. McLaughlin, 24 N. J. Eq. 181; Johnston v. Hyde, 25 N. J. Eq. 454; 33 N. J. Eq. 632; Echelkamp v. Schrader, 45 Mo. 505; Hacker v. Barton, 84 Ill. 313; Bohlman v. Green Bay etc. R'y, 40 Wis. 157, 169; Wilson v. Mineral Point, 39 Wis. 160; Avery v. Empire Woolen Co., 82 N. Y. 582; Henderson v. N. Y. Cent. R. R., 78 N. Y. 423; Prot. Ref. Dutch Church v. Bogardus, 5 Hun, 304; Morgan v. Palmer, 48 N. H. 336; Creely v. Bay State B. Co., 103 Mass. 514; and see the California cases cited *ante*, under Private Nuisance.

[1] Such publications may be restrained by preliminary as well as by final injunction. The jurisdiction is exercised with great caution, and only where the facts are clearly established, and the untruth of the publication is satisfactorily shown. The following are the most important cases: Quartz Hill etc. Co. v. Beall, L. R. 20 Ch. Div. 501, 507 (libel on a corporation); Halsey v. Brotherhood, L. R. 19 Ch. Div. 386; 15 Ch. Div. 514 (slander of title to a patent right); Dicks v. Brooks, L. R. 15 Ch. Div.

diction is not based, as it seems, upon any statutory enlargement of the inherent powers of equity; but is the result of the new system by which the one court is empowered to administer both legal and equitable remedies in any and all actions. The American courts seem, thus far, unwilling to follow the example of the recent English decisions, and they decline to extend the jurisdiction so as to restrain such torts as libels on business, slanders of title, and the like.[2]

22 (same); Thomas v. Williams, L. R. 14 Ch. Div. 864, 871, 872 (libel injurious to a trade); Thorley's Cattle Food Co. v. Massam, L. R. 14 Ch. Div. 763, reversing L. R. 6 Ch. Div. 582 (same; a leading case). In Prudential Ass. Co. v. Knott, L. R. 10 Ch. 142, Fisher v. Appollinaris Co., L. R. 10 Ch. 297, Clover v. Royden, L. R. 17 Eq. 190, and Mulkern v. Ward, L. R. 13 Eq. 619, the jurisdiction to enjoin such libelous publications was denied; while in Dixon v. Holden, L. R. 7 Eq. 488, and Springhead etc. Co. v. Riley, L. R. 6 Eq. 551, it had been exercised. See also Shaw v. Earl of Jersey, L. R. 4 C. P. D. 120, 359; Saxby v. Easterbrook, L. R. 3 C. P. D. 339. As to restraining the use of plaintiff's name by defendant in his own business, see Fullwood v. Fullwood, L. R. 9 Ch. Div. 176; James v. James, L. R. 13 Eq. 421; Massam v. Thorley's etc. Co., L. R. 6 Ch. Div. 574; Day v. Brownrigg, L. R. 10 Ch. Div. 294. In Emperor of Austria v. Day, 3 De Gex, F. & J. 217, it was held that an injunction would be granted at the suit of a foreign sovereign to restrain the manufacture and issue, within English territory, of spurious notes and securities of the foreign government.

2 In Massachusetts these decisions are expressly repudiated: Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69; 19 Am. Rep. 310; Whitehead v. Kitson, 119 Mass. 484. Injunctions to restrain libelous publications concerning the plaintiff's business were also refused in Life Ass'n v. Boogher, 3 Mo. App. 173; Mauger v. Dick, 55 How. Pr. 132; and Singer Mfg. Co. v. Domestic etc. Co., 49 Ga. 70; 15 Am. Rep. 674. In Celluloid Mfg. Co. v. Goodyear etc. Co., 13 Blatchf. 375, the jurisdiction is recognized to restrain such publications when they are not only false and injurious, but also malicious.

SECTION III.

MANDATORY INJUNCTIONS.

ANALYSIS.

§ 1359. Nature and object; when granted.

§ 1359. Nature and Object — When Granted.— This term, in strictness, is confined to interlocutory or preliminary injunctions. Where, on the final hearing in a case of nuisance, or interference with easements, or continued trespass analogous to nuisance, the relief is granted compelling the defendant to remove his obstructions or erections, and to restore the plaintiff to his original condition, and thereby to end the wrong, the remedy is in fact an ordinary decree for an abatement, and is in no proper sense an injunction of any kind. But in these and similar cases the *preliminary* injunction, while purporting simply to restrain the wrong, and while negative in its terms, may be so framed that it restrains the defendant from permitting his previous wrongful act to operate, and therefore virtually compels him to undo it by removing the obstructions or erections, and by restoring the plaintiff to his former condition. Such an injunction is termed mandatory, and resembles in its effect the restorative interdict of the Roman law. It is used where the injury is immediate, and pressing, and irreparable, and clearly established by the proofs, and not acquiesced in by the plaintiff, since an order directly compelling an abatement of the nuisance, or a removal of the obstructions, cannot be made upon interlocutory motion.[1]

[1] Preliminary mandatory injunctions have undoubtedly been granted more freely by the English courts than by the American. Indeed, it has been said in some American decisions that a mandatory *interlocutory* injunction would never be granted. This doctrine is not only opposed to the overwhelming weight of authority, but is contrary to the principle which regulates the administration of preventive relief, and is manifestly absurd.

In Robinson v. Lord Byron, 1 Brown Ch. 588, Lord Eldon granted a

The rule is fully established, at least by the English decisions, and is not controverted by American authority, that in such cases, where the facts are clearly established and the injury is real, and the plaintiff acted promptly upon his acquiring knowledge of the defendant's proceeding, a preliminary mandatory injunction may be granted, although the act complained of was fully completed before

preliminary injunction restraining defendant "from using and maintaining certain dams, gates, etc., so as to prevent water from flowing to plaintiff's mill as it had done." This was done for the express purpose of compelling defendant to remove the dams, gates, etc., which he had constructed. In Lane v. Newdigate, 10 Ves. 192, Lord Eldon granted a preliminary injunction restraining defendant "from impeding plaintiff from navigating [a certain canal] by continuing to keep the canal banks and works out of repair, by diverting the water, or by continuing the removal of the stop-gate." Lord Eldon said this would have the effect of causing defendant to restore the stop-gate and repair the banks; and he avowedly granted the injunction for that express object. These two cases are among the earliest, if not the very earliest, instances of preliminary injunctions intentionally and expressly mandatory in their operation. The following cases will furnish numerous illustrations, and will also show the limitations placed upon their use: Rankin v. Huskisson, 4 Sim. 13; Hervey v. Smith, 1 Kay & J. 389, 392; Att'y-Gen. v. Metropolitan Board of Works, 1 Hem. & M. 298, 312; Hepburn v. Lordan, 2 Hem. & M. 345, 352; Earl of Mexborough v. Bower, 7 Beav. 127, 133; Greatrex v. Greatrex, 1 De Gex & S. 692; Green v. Green, 5 Hare, 400, note; Great North of England R'y v. Clarence R'y, 1 Coll. C. C. 507, 517, 521, 526; Blakemore v. Glamorganshire Canal Nav., 1 Mylne & K. 154, 183; Spencer v. Birmingham R'y, 8 Sim. 193, 198; Att'y-Gen. v. Manchester R'y, 8 Sim. 436; Hooper v. Brodrick, 11 Sim. 47; Gaskin v. Balls, L. R. 13 Ch. Div. 324; Krehl v. Burrell, L. R. 7 Ch. Div. 551; Cooke v. Chilcott, L. R. 3 Ch. Div. 694; Lord Manners v. Johnson, L. R. 1 Ch. Div. 673; City of London etc. Co. v. Tennant, L. R. 9 Ch. 212; Holmes v. Upton, L. R. 9 Ch. 214, note; Goodson v. Richardson, L. R. 9 Ch. 221; Att'y-Gen. v. Mid-Kent R'y, L. R. 3 Ch. 100; Durell v. Pritchard, L. R. 1 Ch. 244; Smith v. Smith, L. R. 20 Eq. 500; Lady Stanley v. Earl of Shrewsbury, L. R. 19 Eq. 616; Bowes v. Law, L. R. 9 Eq. 636; Senior v. Pawson, L. R. 3 Eq. 330; Beadel v. Perry, L. R. 3 Eq. 465; Martin v. Headon, L. R. 2 Eq. 425; Spokes v. Banbury Board of Health, L. R. 1 Eq. 42; Curriers' Co. v. Corbett, 4 De Gex, J. & S. 764; Jacomb v. Knight, 3 De Gex, J. & S. 533; Low v. Innes, 4 De Gex, J. & S. 286; Isenberg v. East India House Co., 3 De Gex, J. & S. 263; Kernot v. Potter, 3 De Gex, F. & J. 447; Black v. Good Intent etc. Co., 31 La. Ann. 497; Longwood etc. R. R. v. Baker, 27 N. J. Eq. 166; Rogers Locomotive Works v. Erie R. R., 20 N. J. Eq. 379; Cole etc. Min. Co. v. Virginia etc. Water Co., 1 Saw. 685; Corning v. Troy Iron etc. Factory, 40 N. Y. 191, 205; Auburn etc. P. R. v. Douglass, 12 Barb. 553; Penniman v. N. Y. Balance etc. Co., 13 How. Pr. 40.

the suit was commenced. It should be observed, however, that no other equitable remedy is more liable to be defeated by acquiescence, or by delay on the plaintiff's part from which acquiescence may be inferred. The cases require of the plaintiff a promptness in objecting and in taking steps to enforce his objection, upon receiving notice of the defendant's structures or erections which are sought to be restrained, if the circumstances are such that the defendant would be unnecessarily prejudiced by the plaintiff's delay.[2]

SECTION IV.

TO RESTRAIN ACTIONS OR JUDGMENTS AT LAW.

ANALYSIS.

§ 1360. Origin of the jurisdiction.
§ 1361. When the jurisdiction is not exercised: General doctrine.
§ 1362. When the jurisdiction may be exercised: First class; exclusive equitable interests or rights involved.
§ 1363. The same: Second class; legal remedies inadequate.
§ 1364. The same: Third class; fraud, mistake, or accident in the trial at law.
§ 1365. Jurisdiction to grant new trials at law in the United States.

§ 1360. **Origin of the Jurisdiction.**— The use of injunctions to stay actions at law was almost coeval with the establishment of the chancery jurisdiction. Without this means of interference to protect the rights of its suitors, the court of chancery could never have established, extended, and

[2] See *ante*, vol. 2, § 817. In some cases a delay by the plaintiff would clearly not be prejudicial to defendant. For example, in Greatrex v. Greatrex, 1 De Gex & S. 692, one partner had wrongfully removed the partnership books from the place of business, and a preliminary injunction was granted, restraining him "from keeping them or permitting them to be kept at any other place than the place of business," thus compelling him to restore the books. Here a delay of weeks or even months could work the defendant no harm. Where the injunction is sought to compel the removal of structures, walls, buildings, and the like, if the plaintiff knowingly permit the defendant to go on and incur any considerable further expenditure of money before he makes objection, he will generaliy lose his right to the somewhat special remedy of a mandatory injunction.

enforced its own jurisdiction.[1] It is no exaggeration to say that, during its formative periods, the equitable jurisdiction was built up through the instrumentality of the injunction restraining the prosecution of legal actions, where the defendants sought the aid of chancery, which alone could take cognizance of the equities that would defeat a recovery at law against them. This was not accomplished, however, without a long and severe opposition from the common-law judges, which continued until the reign of James I.[2] The jurisdiction then firmly established by judicial authority has never since been questioned.[3] The reasons urged by the common-law judges were frivolous. The injunction is not addressed to, nor does it operate upon, the courts of law; instead of denying or interfering with, it virtually admits and assumes, their jurisdiction. It is addressed to the litigant parties, and prohibits them from resorting to the legal jurisdiction, because their controversies, depending upon equitable principles, or involving equitable features, can only be fully and finally determined by a tribunal having the equitable jurisdiction. Injunction is the remedy which, above all others, necessarily operates *in personam*.

§ 1361. **When the Jurisdiction is not Exercised — General Doctrine.**—Where a court of law can do as full justice to the parties and to the matter in dispute as can be done in equity, a court of equity will not stay proceedings at law.[1] Equity will not restrain a legal action or judgment where the controversy would be decided by the court of equity upon a ground equally available at law, unless the party invoking the aid of equity can show some special *equitable* feature or ground of relief; and in the case assumed, this special fea-

§ 1360, [1] See 1 Spence's Eq. Jur. 674.

§ 1360, [2] For a full account of this memorable contest, and its settlement under James I., see 1 Lord Campbell's Lives of the Chancellors, 235; 1 Spence's Eq. Jur. 675; 1 Hallam's Const. Hist. 472.

§ 1360, [3] Ayloffe v. Duke, 2 Freem. Ch. 152 (A. D. 1655); Hawkshaw v. Parkins, 2 Swanst. 539, 548; Franklyn v. Thomas, 3 Mer. 225, 234.

§ 1361, [1] Southampton Dock Co. v. Southampton etc. Board, L. R. 11 Eq. 254.

ture or ground must necessarily be something connected with the mode of trying and deciding the legal action, and not with the cause of action or the defense themselves.[2] It is not such a special equitable ground of interference that the party has, by his own act or omission, failed to effectually avail himself of a valid defense at law, nor that the court of law has decided a question of law or of fact erroneously.[3] The principle is well established, and is uni-

[2] Because it is assumed that the ground of decision is equally available at law and in equity, and therefore the special equitable feature must be something *dehors* the very issues and merits of the controversy: See Harrison v. Nettleship, 2 Mylne & K. 423.

[3] Simpson v. Lord Howden, 3 Mylne & C. 97, 108; Protheroe v. Forman, 2 Swanst. 227, 233; Ware v. Horwood, 14 Ves. 28, 31; Bateman v. Willoe, 1 Schoales & L. 201, 204, 206. In the last-named case Lord Redesdale stated this rule in language which has ever since been regarded as a correct exposition of the principle: "It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere. Because if a matter has already been investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. Rules are established, some by the legislature, some by the courts themselves, for the purpose of putting an end to litigation, and it is more important that an end should be put to litigation than that justice should be done in every case. . . . . The inattention of parties in a court of law can scarcely be made a subject for the interference of a court of equity. There may be cases cognizable at law and also in equity, and of which cognizance cannot be *effectually* taken at law; and therefore equity does sometimes interfere, as in cases of complicated accounts, where the party has not made a defense, because it was impossible for him to do it effectually at law. So where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law, which equity will put out of the way or restrain him from using. But without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law, — a matter capable of being discussed there, and over which a court of law had full jurisdiction." It should be carefully observed that the chancellor is not speaking of those cases which involve, in their very cause of action or defense, features or interests cognizable only by courts of equity; nor of the other class of cases which, in ordinary phraseology, belong to the concurrent jurisdiction both of law and equity; he refers to cases which in *themselves* present no equitable aspect, and properly come within the jurisdiction of the law, but which, for some reason or another, *have been wrongly tried and decided by the court of law.* There must have been some special *equitable* ground connected with this wrongful trial and decision, in order that equity may interfere and restrain the judg-

versal in its application, that when a cause belongs to the jurisdiction of the law courts, equity will never interfere to restrain the prosecution of the action, nor to stay proceedings on the judgment or execution, *upon any mere legal grounds,* although it may be demonstrated that the complainant in equity (generally the defendant at law) had a valid legal defense, which was not made available either through the error of the court in determining the law or the facts, or the omissions of himself or his counsel in presenting it, or in obtaining the evidence by which it could have been supported.[4]

ment. See also Holmes v. Stateler, 57 Ill. 209; McClure v. Miller, Bail. Eq. 107; 21 Am. Dec. 522; New Orleans v. Morris, 3 Woods, 103; Hungerford v. Sigerson, 20 How. 156; Tyler v. Hamersley, 44 Conn. 419; 26 Am. Rep. 479; Wallack v. Soc. Ref. Juv. Del., 67 N. Y. 23; Jackson v. Bell, 31 N. J. Eq. 554; 32 N. J. Eq. 411; Holmes v. Steele, 28 N. J. Eq. 173; Van Syckel v. Emery, 18 N. J. Eq. 387; Vanarsdalen v. Whitaker, 10 Phila. 153; Nelson v. Turner, 2 Md. Ch. 73; Chambers v. Penland, 78 N. C. 53; Att'y-Gen. v. Baker, 9 Rich. Eq. 521; Williams v. Stewart, 56 Ga. 663; Brown v. Wilson, 56 Ga. 534; Shaw v. Lindsey, 60 Ala. 344; Womack v. Powers, 50 Ala. 5; O'Connor v. Sheriff, 30 La. Ann., pt. 1, 441; Graham v. Roberts, 1 Head, 56, 59; Chadwell v. Jordan, 2 Tenn. Ch. 635; Hartman v. Heady, 57 Ind. 545; Comstock v. Henneberry, 66 Ill. 212; La Crosse etc. Co. v. Reynolds, 12 Minn. 213; Kemp v. Tucker, L. R. 8 Ch. 369; Baron de Womes v. Millier, L. R. 16 Eq. 554.

[4] Hendrickson v. Hinckley, 17 How. 443, 445; Walker v. Robbins, 14 How. 584; Creath's Adm'r v. Sims, 5 How. 192; Marine Ins. Co. v. Hodgson, 7 Cranch, 332; Barker v. Elkins, 1 Johns. Ch. 465; Windwart v. Allen, 13 Md. 196; Katz v. Moore, 13 Md. 566; Lyday v. Douple, 17 Md. 188; Methodist Church v. Baltimore, 6 Gill, 391; 48 Am. Dec. 540; Brandon v. Green, 7 Humph. 130; Duckworth v. Duckworth's Adm'r, 35 Ala. 70; Holmes v. Stateler, 57 Ill. 209; Vennum v. Davis, 35 Ill. 568; Hinrichsen v. Van Winkle, 27 Ill. 334; Johnson v. Lyon, 14 Iowa, 431. In Hendrickson v. Hinckley, *supra,* Mr. Justice Curtis stated the principle in a very concise manner: "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense, or had a good defense at law which he was prevented from availing himself of by fraud or accident unmixed with negligence of himself or his agents."

It is immaterial whether the question or matter relied upon by the complainant in equity was considered by the law court or not. Omission to present or to make out a defense at law is not a ground for equitable relief: Marine Ins. Co. v. Hodgson, 7 Cranch, 332; Day v. Cummings, 19 Vt. 496; Peace v. Nailing, 1 Dev. Eq. 289; Champion v. Miller, 2 Jones Eq. 194; White v. Cahal's Adm'r, 2 Swan, 550.

§ 1362. **When the Jurisdiction may be Exercised — First Class — Equitable Rights.**— I pass from this negative view to consider the doctrine on its affirmative side. The cases in which, according to its original jurisdiction unaffected by statute, equity may interfere by injunction, and restrain an action at law either before or after judgment, may be

The error of the court of law in admitting or excluding evidence, or in instructing the jury, is no ground for the interposition of equity: Ferrine v. Striker, 7 Paige, 598; Hartshorn v. Davenport, 2 Barb. Ch. 77; Vilas v. Jones, 1 N. Y. 274; Vaughn v. Johnson, 9 N. J. Eq. 173; Clapp v. Ely, 10 N. J. Eq. 178; Hood v. New York etc. R. R., 23 Conn. 609; Dilly v. Barnard, 8 Gill & J. 170; Prather v. Prather's Adm'r, 11 Gill & J. 170; Harnsbarger's Adm'r v. Kinney, 13 Gratt. 511; Powell v. Watson, 6 Ired. Eq. 94; Yarborough v. Thompson, 3 Smedes & M. 291; 41 Am. Dec. 626; Paynter v. Evans, 7 B. Mon. 420; Shortridge v. Bartlett, 14 B. Mon. 200; Price v. Johnson Co., 15 Mo. 433; Danaher v. Prentiss, 22 Wis. 311.

That the legal defense was not successful, through the ignorance, negligence, or mistake of the party's own attorney or counsel, is no ground for interference: Warner v. Conant, 24 Vt. 351; 58 Am. Dec. 178; Burton v. Wiley, 26 Vt. 430; Emerson v. Udall, 13 Vt. 477; 37 Am. Dec. 604; Powell v. Stewart, 17 Ala. 719; Jamison v. May, 13 Ark. 600; Graham v. Roberts, 1 Head, 56.

Ignorance of the facts constituting the defense does not excuse the omission of the party to make it, nor entitle him to the aid of equity, unless it can be shown that the party could not have acquired the information by the diligent and careful labor in preparing the cause for trial which he is bound to use: Ocean Ins. Co. v. Fields, 2 Story, 59; Truly v. Wanzer, 5 How. 141; Emerson v. Udall, 13 Vt. 477; 37 Am. Dec. 604; Slack v. Wood, 9 Gratt. 40; Allen v. Hamilton, 9 Gratt. 255; Miller v. Gaskins, Smedes & M. Ch. 524; Moran v. Woodyard, 8 B. Mon. 537; Smith v. Allen, 63 Ill. 474; Holmes v. Stateler, 57 Ill. 209; Hinrichsen v. Van Winkle, 27 Ill. 334.

Criminal proceedings will never be enjoined: Kerr v. Corporation of Preston, L. R. 6 Ch. Div. 463; Saull v. Browne, L. R. 10 Ch. 64; Portis v. Fall, 34 Ark. 375; Phillips v. Stone Mt., 61 Ga. 386.

An injunction will not ordinarily be granted to restrain an action in a foreign country or in another state, but may be, under special circumstances: In re Boyse, L. R. 15 Ch. Div. 591; Moor v. Anglo-Italian Bank, L. R. 10 Ch. Div. 681; Hope v. Carnegie, L. R. 1 Ch. 320; In re Chapman, L. R. 15 Eq. 75; Ostell v. Le Page, 2 De Gex, M. & G. 892; Kittle v. Kittle, 8 Daly, 72; Cole v. Young, 24 Kan. 435.

Proceedings in another *equitable* action may, in a proper case, be enjoined: Prudential Assur. Co. v. Thomas, L. R. 3 Ch. 74; Mann v. Flower, 26 Minn. 479; Bond v. Greenwald, 7 Baxt. 466; Haescig v. Brown, 34 Mich. 503. And see Erie R'y v. Ramsey, per Folger, J., quoted *post*, in note under § 1371; but see Endter v. Lennon, 46 Wis. 299. Restraining proceedings in probate courts for want of jurisdiction, see Wright v. Fleming, 76 N. Y. 517.

reduced to three general classes: 1. Where the controversy, in addition to its legal aspect, involves some equitable estate, right, or interest which is exclusively cognizable by a court of equity, so that a complete determination of the issues cannot be made by a court of law, it is well settled that equity not only may, but must, interfere at the suit of the party in whom the equitable estate or right is vested, and restrain the action at law, and decide the whole controversy. This is so when the defendant at law has a purely equitable defense which the court of law will not recognize or enforce, and especially when he is entitled to some affirmative equitable relief which will clothe him with a legal right or title, and thus defeat the legal action brought against him. Cases of this kind belong to the first branch of the exclusive jurisdiction of equity as described in the first volume.[1] This rule assumes

[1] See *ante*, § 219, and cases cited in note. The cases to which this doctrine is applicable are numberless, and in fact cover the entire domain of equitable estates, interests, and primary rights which constitute the first branch of the exclusive jurisdiction. The following cases give examples of equitable rights which have thus been protected: Hibbard v. Eastman, 47 N. H. 507; 93 Am. Dec. 467; Ross v. Harper, 99 Mass. 175; Fanning v. Dunham, 5 Johns. Ch. 122; 9 Am. Dec. 283; Skinner v. White, 17 Johns. 357; Varick v. Edwards, Hoff. Ch. 382; 11 Paige, 289; 5 Denio, 664, 679; County of Armstrong v. Brinton, 47 Pa. St. 367, 374; Jones v. Slubey, 5 Har. & J. 372; White v. Crew, 16 Ga. 416; Pollock v. Gilbert, 16 Ga. 398; 60 Am. Dec. 732; Frith v. Roe, 23 Ga. 139; Greenlee v. Gaines, 13 Ala. 198; 48 Am. Dec. 49; Henwood v. Jarvis, 27 N. J. Eq. 247; Wyckoff v. Victor etc. Co., 43 Mich. 309; Scrivin v. Hursh, 39 Mich. 98; Detroit etc. R. R. v. Brown, 37 Mich. 533; Haescig v. Brown, 34 Mich. 503; Pindell v. Quinn, 7 Ill. App. 605; Hager v. Buechler, 6 Ill. App. 462; Moses v. Sanford, 2 Lea, 655; Breeden v. Grigg, 8 Baxt. 163; Deaderick v. Mitchell, 6 Baxt. 35; Frank v. Morris, 9 W. Va. 664; Hill v. Billingsly, 53 Miss. 111; Texas Land Co. v. Turman, 53 Tex. 619; Earl of Aylesford v. Morris, L. R. 8 Ch. 484; Lord Tredegar v. Windus, L. R. 19 Eq. 607; Crofts v. Middleton, 8 De Gex, M. & G. 192; Evans v. Bremridge, 8 De Gex, M. & G. 100; and see *ante*, vol. 2, cases in note under § 914.

Under the application of this doctrine, an action at law may be enjoined, in order to avoid a multiplicity of suits, or a circuity of action: See *ante*, vol. 1, §§ 245 *et seq.;* Oelrichs v. Spain, 15 Wall. 211, 228; Penn. etc. Co. v. Delaware etc. Co., 31 N. Y. 91; Eldridge v. Hill, 2 Johns. Ch. 281; Tice v. Annin, 2 Johns. Ch. 125; Trustees etc. v. Nicoll, 3 Johns. 566; West v. Mayor etc., 10 Paige, 539; Jumel v. Jumel, 7 Paige, 591; Heyer

that the equitable questions contained in the defense extend to the entire cause, so that their decision determines the controversy. When the cause contains both legal and equitable questions which are distinct, the court of equity, while taking jurisdiction, may not restrain the proceedings at law prior to the obtaining of judgment.[2]

§ 1363. The Same. Second Class.— 2. The second general class includes those cases which belong to the second branch of the *exclusive* jurisdiction of equity as heretofore described;[1] or, in the ordinary nomenclature of the books, cases over the facts of which both courts of law and of equity have a concurrent jurisdiction to grant their respective and distinctive remedies; for example, cases involving actual fraud, such as suits upon instruments, where the defense is fraud in procuring their execution. Where the jurisdiction is thus said to be concurrent, or in other words, where the interests and primary rights of the parties are legal, and the only question between the two courts relates to the adequacy of their respective remedies, as a

v. Pruyn, 7 Paige, 465; 34 Am. Dec. 355; Marsh v. Pike, 10 Paige, 595; Woodruff v. Fisher, 17 Barb. 224; Third Ave. R. R. v. The Mayor etc., 54 N. Y. 159; Paterson etc. R. R. v. Jersey City, 9 N. J. Eq. 434; Stevenson v. Black, 1 N. J. Eq. 338; Klapworth v. Dressler, 13 N. J. Eq. 62; 78 Am. Dec. 69; Woods v. Monroe, 17 Mich. 238; Scott v. Shreeve, 12 Wheat. 605. And also in suits brought to obtain a discovery in aid of the defense at law: Boughton v. Phillips, 6 Paige, 433; King v. Clark, 3 Paige, 76; Williams v. Harden, 1 Barb. Ch. 298.

2 See Williams v. Earl of Jersey, Craig & P. 91; Gridley v. Garrison, 4 Paige, 647; Mitchell v. Oakley, 7 Paige, 68; Ragsdale v. Hagy, 9 Gratt. 409; Justice v. Scott, 4 Ired. Eq. 108; Hill v. Billingsly, 53 Miss. 111.

In the cases referred to, it is supposed that there are both legal and equitable issues which may be tried and decided separately, and the decision of neither determines the whole controversy. Of course, if the equitable issues are really the very gist of the cause, and upon their decision the whole case really turns, and the ends of justice demand it, the court of equity may take control of the entire controversy by enjoining the further prosecution of the action at law. It is only where the decision of the equitable issues would necessarily defeat the whole right at law and destroy the entire legal cause of action, that the chancellor *must* take the entire controversy under his own control. It is then a matter of right, and not of discretion.

1 See *ante*, §§ 220, 221, and cases cited in note 2, under § 221.

general rule the tribunal which first exercises jurisdiction is entitled, or at least permitted, to retain an exclusive control of the issues.[2] It is therefore a well-settled doctrine that in cases of this kind, where the primary rights of both parties are legal, and courts of law will grant their remedies, and courts of equity may also grant their peculiar remedies, equity will not interfere to restrain the action or judgment at law, *provided the legal remedy will be adequate;* that is, provided the judgment at law will do full justice between the parties, and will afford a complete relief; the adequacy or inadequacy of the legal remedy is the sole and universal test.[3] On the other hand, in cases of this general class, equity will enjoin the action at law, and will determine the whole cause, whenever the legal remedy is inadequate; and the legal remedy is deemed to be inadequate if the ends of justice would not be satisfied by a mere judgment for the defendant in the action at law, but would require that some distinctively equitable relief, such as a cancellation or a reformation of the instrument sued upon, be conferred upon him. If any affirmative equitable relief is necessary to a full settlement of the controversy, and to a complete protection of the defendant's rights, a court of equity will interfere, entertain a suit for such relief, and enjoin the action at law.[4] The scope of this

[2] See *ante*, § 179; Mallett v. Dexter, 1 Curt. 178; Stearns v. Stearns, 16 Mass. 167, 171; Winn v. Albert, 2 Md. Ch. 42; Merrill v. Lake, 16 Ohio, 373; 47 Am. Dec. 377; Thompson v. Hill, 3 Yerg. 167.

[3] See *ante*, §§ 220, 221, and cases cited; Insurance Co. v. Bailey, 13 Wall. 616; Grand Chute v. Winegar, 15 Wall. 373; Hipp v. Babin, 19 How. 271; Smith v. McIver, 9 Wheat. 532; Russell v. Clark's Ex'rs, 7 Cranch, 69; Bank of Bellows Falls v. Rutland etc. R. R., 28 Vt. 470; Hazard v. Irwin, 18 Pick. 95; Fleming v. Slocum, 18 Johns. 403; 9 Am. Dec. 224; Roberts v. Anderson, 3 Johns. Ch. 371; 18 Johns. 515; Crane v. Bunnell, 10 Paige, 333; Camden etc. R. R. v. Stewart, 18 N. J. Eq. 489; Gould v. Hayes, 19 Ala. 438; Bumpass v. Reams, 1 Sneed, 595; Mason v. Piggott, 11 Ill. 85; Ross v. Buchanan, 13 Ill. 55; Southerland v. Harper, 83 N. C. 200; Jackson v. Bell, 31 N. J. Eq. 554; 32 N. J. Eq. 411; Imperial Fire Ins. Co. v. Gunning, 81 Ill. 236; Hoare v. Bremridge, L. R. 8 Ch. 22; 14 Eq. 522; Ochsenbein v. Papelier, L. R. 8 Ch. 695.

[4] Glastenbury v. McDonald's Adm'r, 44 Vt. 453; Atlantic etc. Co. v. Tredick,

particular doctrine is plainly identical with that which governs the second branch of the exclusive jurisdiction of equity as described in the first volume. Whenever a court of equity exercises its jurisdiction over a case involving only *legal* interests and primary rights, for the purpose of awarding its exclusively equitable remedies, because the legal remedies would be inadequate, it will always, if necessary, enjoin an action at law which interrupts the full exercise of its jurisdiction.

§ 1364. **The Same. Third Class.**— 3. In the two preceding classes of cases the ground for interference was some equitable element or feature involved in the very subject-matter of the controversy, or in the remedies appropriate thereto, which constituted an equitable defense in full or in part to the legal action, and over which the court of equity had either a concurrent or an exclusive jurisdiction. In the present class there is no such equitable element or

5 R. I. 171; Bissell v. Beckwith, 33 Conn. 357; Hamilton v. Cummings, 1 Johns. Ch. 517; Bushnell v. Harford, 4 Johns. Ch. 301; Dale v. Roosevelt, 5 Johns. Ch. 174; Metler v. Metler's Adm'rs, 19 N. J. Eq. 457; Morris v. Barnwell, 60 Ga. 147; Mitchell v. Word, 60 Ga. 525; Radcliffe v. Varner, 56 Ga. 222; Scott v. Scott, 33 Ga. 102; Coville v. Gilman, 13 W. Va. 314; Henwood v. Jarvis, 27 N. J. Eq. 247; Boyce's Ex'rs v. Grundy, 3 Pet. 210, 215; London etc. Ins. Co. v. Seymour, L. R. 17 Eq. 85; Traill v. Baring, 4 De Gex, J. & S. 318; Athenæum L. Ass. Soc. v. Pooley, 3 De Gex & J. 294; and cases cited *ante*, in note under § 914.

There is some disagreement among the decisions upon the question of equity taking jurisdiction to compel the cancellation of an instrument, when the contracting party who seeks this relief might set up the same defense in an action at law and defeat a recovery. Compare Insurance Co. v. Bailey, 13 Wall. 616, and Grand Chute v. Winegar, 15 Wall. 373, with Franklin v. Green, 2 Allen, 519, 522, and Commercial etc. Ins. Co. v. McLoon, 14 Allen, 351.

Within the scope of this doctrine, a court of equity will restrain the transfer of negotiable paper, or things in action, or chattels, or sometimes land, by one who has obtained their title fraudulently, to persons who would take them as *bona fide* purchasers for value, and thus hold them freed from existing equities: See *ante*, § 1340; Poor v. Carleton, 3 Sum. 70; Glastenbury v. McDonald's Adm'r, 44 Vt. 453; Bank of Bellows Falls v. Rutland etc. R. R., 28 Vt. 470; Franklin v. Green, 2 Allen, 519; Sherman v. Fitch, 98 Mass. 59; Ferguson v. Fisk, 28 Conn. 501; Hamilton v. Cummings, 1 Johns. Ch. 517; Delafield v. Illinois, 26 Wend. 192; Van Doren v. The Mayor etc., 9 Paige, 388; Cox v. Clift, 2 N. Y. 118; Metler's Adm'rs v. Metler, 18 N. J. Eq. 270; 19 N. J. Eq. 457; Bell v. Gamble, 9 Humph. 117.

feature of the controversy; there is no equitable defense embraced in any possible issues, no equitable right or interest of the defendant which defeats or modifies the legal cause of action; all the issues are wholly legal. The ground for the equitable jurisdiction to interfere is, therefore, something *dehors* the issues, something arising out of or connected with the *trial* itself of the legal action in the court of law. It was a settled doctrine of the equitable jurisdiction — and is still the subsisting doctrine except where it has been modified or abrogated by statute, or has become obsolete through the enlarged powers of the law courts to grant new trials — that where the legal judgment was obtained or entered through fraud, mistake, or accident, or where the defendant in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his part, or on the part of his agents, then a court of equity will interfere at his suit, and restrain proceedings on the judgment which cannot be conscientiously enforced. From the very nature of the case, this interference takes place after the judgment, and not while the action at law is pending.[1]

[1] Truly v. Wanzer, 5 How. 141; David v. Tileston, 6 How. 114; Hendrickson v. Hinckley, 17 How. 443; 5 McLean, 211; Marine Ins. Co. v. Hodgson, 7 Cranch, 332; Ocean Ins. Co. v. Fields, 2 Story, 59; Robinson v. Wheeler, 51 N. H. 384; Wingate v. Haywood, 40 N. H. 437, 441; Emerson v. Udall, 13 Vt. 477; 37 Am. Dec. 604; Gainty v. Russi, 40 Conn. 450; Dobson v. Pearce, 12 N. Y. 156; 62 Am. Dec. 152; Mann v. Worrall, 16 Barb. 221; Foster v. Wood, 6 Johns. Ch. 87; Tomkins v. Tomkins, 11 N. J. Eq. 512, 514; Gifford v. Thorn, 9 N. J. Eq. 703; Moore v. Gamble, 9 N. J. Eq. 246; Glover v. Hedges, 1 N. J. Eq. 113, 119; Boulton v. Scott's Adm'rs, 3 N. J. Eq. 231, 236, 241; Wistar v. McManes, 54 Pa. St. 318; 93 Am. Dec. 700; Webster v. Skipworth, 26 Miss. 341; Humphries v. Bartee, 10 Smedes & M. 282, 295; Pelham v. Moreland, 11 Ark. 442; Nelson v. Rockwell, 14 Ill. 375; How v. Mortell, 28 Ill. 479; New Orleans v. Morris, 3 Woods, 103; Smith v. McLain, 11 W. Va. 654; Shields v. McClung, 6 W. Va. 79; Crim v. Handley, 94 U. S. 652.

Among the examples of the fraud, etc., which are a ground for this equitable jurisdiction, are the following: Where the defendant is prevented from defending by false and fraudulent promises or representations that the proceeding will not be carried on against him, and, relying thereon, he does not contest the case, as he might have done, and a judgment is thus

§ 1365. Jurisdiction to Grant New Trials at Law in the United States.— How far does the doctrine of this third general class of cases operate under the modern legislation, and the principles of equity jurisprudence as administered in the United States? The jurisdiction of the English chancery to enjoin judgments at law, not by reason of any equitable right involved in the controversy itself, but on account of wrongful acts or omissions accompanying the trial at law, originated at a time when the law courts had little or no power to grant new trials for such causes. To

obtained against him: Pearce v. Olney, 20 Conn. 544; Huggins v. King, 3 Barb. 616; Powers's Ex'rs v. Butler's Adm'r, 4 N. J. Eq. 465; Holland v. Trotter, 22 Gratt. 136; Booth v. Stamper, 6 Ga. 172; Brooks v. Whitson, 7 Smedes & M. 513; How v. Mortell, 28 Ill. 479; Perry v. Siter, 37 Mo. 273; Jarboe v. Kepler, 4 Ind. 177; McLeran v. McNamara, 55 Cal. 508; Miller v. Harrison, 32 N. J. Eq. 76; Cregar v. Cramer, 31 N. J. Eq. 375; Purviance v. Edwards, 17 Fla. 140; Hinckley v. Miles, 15 Hun, 170; Scriven v. Hursh, 39 Mich. 98; Harris v. Western etc. R. R., 59 Ga. 830; Baker v. Redd, 44 Iowa, 179; Markham v. Angier, 57 Ga. 43; Ellis v. Kelly, 8 Bush, 621, 631. The same would be true of fraudulent practices by which the defendant's witnesses were tampered with or removed, or his evidence was destroyed, so that he was unable to substantiate his defenses.

Accident, if without any negligence on the part of the one who asks the relief, — as, for example, sickness preventing a defendant from making his legal defense: Bell v. Cunningham, 1 Sum. 89; Devoll v. Scales, 49 Me. 320; Carrington v. Holabird, 17 Conn. 530; 19 Conn. 87; Forrester v. Wilson, 1 Duer, 624; Griffith v. Brown, 3 Rob. (N. Y.) 627; Aaron v. Baum, 7 Rob. (N. Y.) 340; Owen v. Ranstead, 22 Ill. 161; Rice v. R. R. Bank, 7 Humph. 39. Also surprise, ignorance, etc.: Roach v. Duckworth, 61 How. Pr. 128; Beveridge v. Hewitt, 8 Ill. App. 467; Miller v. Harrison, 32 N. J. Eq. 76; Stanton v. Embry, 46 Conn. 65; Markham v. Angier, 57 Ga. 43; Smith v. Pearce, 6 Baxt. 72 (the judge incompetent to sit). Failure to summon, notify, or serve process on the defendant, so that he was ignorant of the proceedings against him: Crafts v. Dexter, 8 Ala. 767; 42 Am. Dec. 666; Stubbs v. Leavitt, 30 Ala. 352; Bell v. Williams, 1 Head, 229; Ridgeway v. Bank of Tenn., 11 Humph. 523, 525; Owens v. Ranstead, 22 Ill. 161; Harshey v. Blackmarr, 20 Iowa, 161; 89 Am. Dec. 520; Walker v. Gilbert, Freem. (Miss.) 85; McNeill v. Edie, 24 Kan. 108; Ryan v. Boyd, 33 Ark. 778; Blakeslee v. Murphy, 44 Conn. 188; see Graham v. Roberts, 1 Head, 56, 59. In general, the party seeking the aid of equity to enjoin a judgment at law against him must not only show some ground for interference, within the doctrine of the text, but must also show that he has a good and sufficient defense to the cause of action, so that on a re-examination and retrial the result would be different: Bradley v. Richardson, 23 Vt. 720; Tomkins v. Tomkins, 11 N. J. Eq. 512, 514; Reeves v. Cooper, 12 N. J. Eq. 223; Dawson v. Merch. etc. Bank, 30 Ga. 664; Saunders v. Albritton, 37 Ala. 716; Way

prevent a failure of justice, a distinct head of equitable jurisdiction was admitted, that of virtually granting new trials — of entertaining suits for a new trial — when a judgment at law had been thus obtained by fraud, mistake, or accident; and the injunction against further proceedings on the judgment was a mere incident of the broader relief which set aside the judgment and granted a rehearing of the controversy in the court of chancery. The original occasion for this special jurisdiction has disappeared. In England, and in most if not all of the American states, either through statutes or through judicial action, the courts of law have acquired, and constantly exercise, full powers to grant new trials, whenever from the wrongful acts or omissions of the successful party, or from accident or the mistake of the other party, or from error or misconduct of

v. Lamb, 15 Iowa, 79, 83; Stokes v. Knarr, 11 Wis. 389; Payne v. Dudley, 1 Wash. (Va.) 196; Sauer v. Kansas, 69 Mo. 46; Lemon v. Sweeney, 6 Ill. App. 507.

The party seeking the aid of equity must also show diligence. A judgment will not be enjoined for any defense or right which could be asserted in the court of law, unless such party can show,— 1. That he was prevented by fraud, mistake, or accident from maintaining his legal rights; and 2. That the obstacle which prevented him could not have been overcome or avoided by any reasonable diligence or care on his part. These requisites are absolutely indispensable; the rule is inflexible, and it is enforced with special strictness when the ground relied upon for relief is newly discovered evidence, which the party had failed to obtain, through ignorance amounting to accident or through fraud: Fletcher v. Warren, 18 Vt. 45; Emerson v. Udall, 13 Vt. 477; 37 Am. Dec. 604; Warner v. Conant, 24 Vt. 351; 58 Am. Dec. 178; Floyd v. Jayne, 6 Johns. Ch. 479; Foster v. Wood, 6 Johns. Ch. 87; Duncan v. Lyon, 3 Johns. Ch. 351; 8 Am. Dec. 513; Graham v. Stagg, 2 Paige, 321; Vilas v. Jones, 1 N. Y. 274; Vaughn v. Johnson, 9 N. J. Eq. 173; Bierne v. Mann, 5 Leigh, 364; Meem v. Rucker, 10 Gratt. 506; Bellamy v. Woodson, 4 Ga. 175; 48 Am. Dec. 221; Robb v. Halsey, 11 Smedes & M. 140; Williams v. Jones, 10 Smedes & M. 108; Conway v. Ellison, 14 Ark. 360; Paynter v. Evans, 7 B. Mon. 420; Thompson v. Meek, 3 Sneed, 271; Smith v. Allen, 63 Ill. 474; Smith v. Powell, 50 Ill. 21; Ruppertsberger v. Clark, 53 Md. 402; Kirby v. Pascault, 53 Md. 531; Hays v. Urquhart, 63 Ga. 323; Carolus v. Koch, 72 Mo. 645; Devinney v. Mann, 24 Kan. 682; Noble v. Butler, 25 Kan. 645; Burke v. Wheat, 22 Kan. 722; Wilson v. Coolidge, 42 Mich. 112; Hannon v. Maxwell, 31 N. J. Eq. 318; Jackson v. Bell, 31 N. J. Eq. 554; 32 N. J. Eq. 411; Holmes v. Steele, 28 N. J. Eq. 173; Earl v. Matheney, 60 Ind. 202; Kern v. Strausberger, 71 Ill. 413; Higgins v. Bullock, 73 Ill. 205; Fuller v. Little, 69 Ill. 229; Newman v.

the judge or the jury, there has been a failure of justice. In other words, the powers of the law courts to set aside verdicts or judgments are so ample as to meet all the requirements of equity and justice, and the special equitable jurisdiction with respect to this matter has become obsolete in the very large majority of the states, if not in all of them.[1] The result is, in my opinion, that practically the only jurisdiction now exercised by courts of equity to enjoin judgments at law, where no equitable right or interest is involved in the controversy, on account of wrongful acts or omissions connected with the trial, is a part of and incidental to the broad jurisdiction which equity possesses to set aside and cancel judgments, deeds, contracts, and the like which have been obtained through fraud, undue influence, or mistake. A court of equity, in general, no longer assumes control over a legal judgment for the purpose of a new trial or any similar relief; it will, in a proper case of fraud or mistake, set aside such judgment; and wherever it will grant this final remedy, it will, as a preliminary and incidental relief, restrain by injunction all proceedings upon the judgment.[2] How far the jurisdiction to enjoin actions and judgments at law in the two other general classes of cases above described has been affected by the reformed procedure, in the states where that procedure prevails, is discussed in the next following chapter.

Morris, 52 Miss. 402; New York etc. R. R. v. Haws, 56 N. Y. 175; Richmond Enquirer Co. v. Robinson, 24 Gratt. 548; Rogers v. Parker, 1 Hughes, 148.

[1] As an illustration, the California Code of Civil Procedure, sec. 657, authorizes a new trial to be granted for the following causes: 1. Irregularity in the proceedings of the court, jury, or adverse party, or misconduct of the court; 2. Misconduct of the jury; 3. Accident or surprise; 4. Newly discovered evidence; 5. Excessive damages; 6. Insufficiency of the evidence; 7. Error of law.

[2] The modern cases, where such judgments at law have been enjoined, will be found, on examination, to have arisen under the more general power, which equity clearly possesses, of setting aside the most solemn proceedings when tainted by fraud. The equitable jurisdiction to entertain bills for a new trial, if it exist at all, must be confined to a very few states.

CHAPTER SECOND.

EQUITABLE DEFENSES INTERPOSED IN LEGAL ACTIONS AS A SUBSTITUTE FOR INJUNCTIONS.

ANALYSIS.

§ 1366. General object.
§ 1367. Equitable pleas under the common-law procedure.
§ 1368. Equitable defenses under the reformed procedure.
§ 1369. Meaning and nature of an equitable defense.
§ 1370. General effect: Injunction against actions at law unnecessary.
§ 1371. Cases in which an injunction may still be necessary: First class; to avoid multiplicity of suits.
§ 1372. The same: Second class; new parties needed.
§ 1373. The same: Third class; no affirmative relief.
§ 1374. Some illustrations of equitable defenses.

§ 1366. **General Object.**— I shall not attempt in this chapter any general discussion of "equitable defenses" as provided for by the reformed procedure; such a discussion would be foreign to the purposes of this work.[1] My sole object is to consider, and if possible to answer, the more narrow questions: How far do equitable defenses interposed in legal actions, under the reformed procedure, interfere with, supersede, or abrogate the jurisdiction to enjoin actions and judgments at law in the first and second classes of cases mentioned in the last preceding section? and in what cases, if any, does that jurisdiction still remain operative, notwithstanding this peculiar feature of the reformed procedure? These inquiries are practically important only in the states and territories which have adopted the new procedure.

§ 1367. **Equitable Pleas under the Common-law Procedure.** — In some states where the two jurisdictions of law and equity are still kept distinct and separate, an equitable de-

[1] The subject of "equitable defenses" includes that of equitable "counterclaims," and both are treated of at large in my work on Remedies by the Civil Action.

fense may be allowed by statute to be pleaded in a legal action pending in a court of law. Would this legislation modify the first two general doctrines formulated in §§ 1362 and 1363 of the last section? A similar statute in England was held to produce no effect whatever upon the equitable jurisdiction; and the same interpretation must undoubtedly be given to any such enactment in the United States.[1]

§ 1368. **Equitable Defenses under the Reformed Procedure — Legislation.**— The provisions of the reformed procedure are much broader, and must *practically* modify to a great extent the original jurisdiction of equity over actions at law. In the single "civil action" which it establishes, legal and equitable causes of action may be united and remedies obtained; legal and equitable defenses may be combined; equitable defenses may be set up to defeat a strictly legal cause of action, in actions which are otherwise wholly legal; and finally, either under the name of "equitable defense" or of "counterclaim," the defendant, as against a legal cause of action and in an action otherwise legal, may obtain the affirmative equitable relief, connected with the subject-matter, which under the former system he could only obtain by a separate suit brought in a court of equity.[1]

§ 1369. **Meaning and Nature of an Equitable Defense.**— It is important to determine, in the first place, the nature and

§ 1367, [1] The common-law procedure act of 1854 (17 & 18 Vict., c. 125, sec. 83) authorized pleas upon equitable grounds. In Jeffs v. Day, L. R. 1 Q. B. 372, the court held that such equitable defenses only were admissible which would be a simple bar to the action, and would entitle defendant to the common-law judgment "that the plaintiff take nothing by his writ." That the equitable jurisdiction was unaffected, see Gompertz v. Pooley, 4 Drew. 448, 453; Kingsford v. Swinford, 28 L. J. Ch. 413; Waterlow v. Bacon, L. R. 2 Eq. 514; Terrell v. Higgs, 1 De Gex & J. 388; Evans v. Bremridge, 8 De Gex, M. & G. 100.

§ 1368, [1] Legal and equitable defenses may also be united in the same answer: See New York, Code Proc., sec. 150; Code Civ. Proc. (new code), secs. 501, 507; Wisconsin, c. 125, sec. 13; Ohio, sec. 93; Missouri, art. 5, secs. 13, 14 (secs. 3522, 3523); Minnesota, c. 66, sec. 98; Florida, sec. 101; Oregon, sec. 72; California, sec. 441; North Carolina, sec. 102; South Carolina, sec. 173; Dakota, sec. 119; Kansas, sec. 94 (3621); Indiana (1881), sec. 347; Iowa, sec. 2655.

meaning of an "equitable defense." A defense is a right possessed by the defendant, arising from the facts alleged in his pleadings, which defeats the plaintiff's cause of action or claim for the remedy demanded by his action. An equitable defense is such a right, which exists solely by virtue of equitable doctrines, and which was originally recognized by courts of equity alone. The right constituting an equitable defense may be one which, when consummated and enforced, confers upon the defendant some affirmative equitable relief clothing him with a paramount *legal* title or estate, and thus defeating the plaintiff's claim; or it may be one which is purely defensive, which entitles the defendant to no affirmative relief, and which simply operates to bar the plaintiff's action. The general term "equitable defense" plainly includes both of these classes.[1] This conclusion has not, however, been uniformly accepted. The doctrine is supported by the decisions of able courts, and seems to be settled in some of the states, that a defendant cannot avail himself of a defense as equitable, unless the facts thereof entitle him to equitable relief against the plaintiff's legal cause of action, nor unless he demands and obtains that specific remedy which, when granted, destroys the cause of action. In other words, he cannot invoke the

[1] Under the English statute of 1854 allowing equitable pleas in actions at law, the courts recognized the fact that some equitable defenses would only operate to bar the plaintiff's action, and would entitle the defendant to no affirmative specific relief, and held that such equitable defenses alone could be pleaded: See *ante*, § 1367. In Dobson v. Pearce, 12 N. Y. 156, 168, 62 Am. Dec. 152, Johnson, J., said: "An equitable defense to a civil action is now as available as a legal defense. The question now is, *Ought the plaintiff to recover?* and anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or of legal cognizance." See also Chase v. Peck, 21 N. Y. 581, 586; Wismer v. Ocumpaugh, 71 N. Y. 113, 117; Webster v. Bond, 9 Hun, 437; Wa Ching v. Constantine, 1 Idaho, 266; Harrington v. Fortner, 58 Mo. 468, 474; Holland v. Johnson, 51 Ind. 346; Maxwell v. Campbell, 45 Ind. 360, 363; Hammond v. Perry, 38 Iowa, 217; Crary v. Goodman, 12 N. Y. 266; 64 Am. Dec. 506; Seeley v. Engell, 13 N. Y. 542; New York Cent. Ins. Co. v. Nat. Protec. Ins. Co., 14 N. Y. 85; Despard v. Walbridge, 15 N. Y. 374; Carpenter v. Oakland, 30 Cal. 439, 442; Harris v. Vinyard, 42 Mo. 568; Kennedy v. Daniels, 20 Mo. 104; Carman v. Johnson, 20 Mo. 108; 61 Am. Dec. 593.

right as a mere defense, or as long as he treats it and relies upon it as a mere defense. If he simply avers facts as a negative defense, he will not be permitted to rely upon them and to defeat the plaintiff's recovery by that means.[2]

§ 1370. General Effect — Injunctions against Actions at Law Unnecessary.— The provisions of the codes, mentioned in the last paragraph but one, render the equitable jurisdiction to restrain legal actions in the great majority of instances wholly useless; and as a matter of fact such jurisdiction, if not actually abrogated, has become practically obsolete, except when certain special circumstances may require its exercise. Whether the defendant's case involves equitable elements which belong to either branch of the exclusive jurisdiction of equity, or has features which bring it within the concurrent jurisdiction, the defendant may, as a general rule, set up his equitable estate, interest, right, or claim by way of defense, and procure the entire controversy to be decided, and the affirmative equitable relief awarded, in the one civil action. There is thus no need of a separate equitable suit and an injunction restraining the legal action; and any resort to the former jurisdiction of equity for such a purpose will be discountenanced and repressed by the courts, unless it should be necessary, from special circumstances, to prevent a failure of justice.[1]

[2] Among the decisions tending to support this view, see Follett v. Heath, 15 Wis. 601; Lombard v. Cowham, 34 Wis. 486, 492; Du Pont v. Davis, 35 Wis. 631, 639; Hicks v. Sheppard, 4 Lans. 335, 337; Cramer v. Benton, 60 Barb. 216; Dewey v. Hoag, 15 Barb. 365; Conger v. Parker, 29 Ind. 380; Kenyon v. Quinn, 41 Cal. 325; Bruck v. Tucker, 42 Cal. 346, 352; Miller v. Fulton, 47 Cal. 146; McClane v. White, 5 Minn. 178, 190. In Wisconsin the defendant is required by statute to demand affirmative relief in pleading an equitable defense: Rev. Stats., c. 141, sec. 7. See also, on the general question, Webster v. Bond, 9 Hun, 437; Quebec Bank v. Weyand, 30 Ohio St. 126; Hinkle v. Margerum, 50 Ind. 240; Winslow v. Winslow, 52 Ind. 8; Hampson v. Fall, 64 Ind. 382; Pennoyer v. Allen, 51 Wis. 360; 50 Wis. 308; Lawe v. Hyde, 39 Wis. 345; Kentfield v. Hayes, 57 Cal. 409; Hatcher v. Briggs, 6 Or. 31; Ten Broeck v. Orchard, 74 N. C. 409; Pomeroy on Remedies, sec. 91.

[1] Under the new procedure all the courts of general original jurisdiction

§ 1371. Cases in Which an Injunction may Still be Necessary. First Class — Multiplicity of Suits.— There are, however, special circumstances in which a resort to the injunctive jurisdiction may still be necessary, in order to prevent a failure of justice. These cases may, I think, be reduced to a few general classes: 1. Where it is essential to promote the ends of justice that an entire controversy should be determined in one proceeding, so that the rights and duties of all parties interested may be finally settled, it may be necessary to restrain other suits, so as to prevent the pendency of two or more actions involving the same subject-matter, or to prevent a partial litigation of the controversy, or to prevent a multiplicity of suits depending upon the same facts or principles. In short, the jurisdiction must sometimes be exercised to prevent a multiplicity of actions, or partial investigations which would work injustice.[1] It should be observed that the proceeding en-

possess full equity powers; and this fact somewhat enlarges the scope of the chancery rule, that one court of equity will not, in general, enjoin the proceedings in another tribunal having the same equitable powers. As illustrations of the text, see Grant v. Quick, 5 Sand. 612; Carpenter v. Keating, 10 Abb. Pr., N. S., 223, 228; Minor v. Webb, 10 Abb. Pr. 284; Harman v. Remsen, 23 How. Pr. 174; Bowers v. Tallmadge, 16 How. Pr. 325; Arndt v. Williams, 16 How. Pr. 244; Bennett v. Le Roy, 14 How. Pr. 178; Hunt v. Farmers' L. & T. Co., 8 How. Pr. 416; Dederick v. Hoysradt, 4 How. Pr. 350; Platto v. Deuster, 22 Wis. 482; Anthony v. Dunlap, 8 Cal. 26; Revalk v. Kraemer, 8 Cal. 66; 68 Am. Dec. 304; Gorham v. Toomey, 9 Cal. 77; Uhlfelder v. Levy, 9 Cal. 607; Wood v. Swift, 81 N. Y. 31.

[1] Erie R'y v. Ramsey, 45 N. Y. 637; Uhlfelder v. Levy, 9 Cal. 607, 615; Engels v. Lubeck, 4 Cal. 31. In the first of these cases the whole subject of the jurisdiction as modified by the new procedure was so fully and ably examined that I shall quote from the opinion of Folger, J., at some length. Ramsey had commenced an equitable suit against the Erie railroad before the supreme court in one district (the sixth). The company thereupon brought another equitable suit against Ramsey before the same court in a different district (the first), and obtained a preliminary injunction restraining Ramsey from the further prosecution of *his* action. Ramsey was adjudged by the court in the first district to have violated this injunction, and was fined for the contempt. He appealed to the court of appeals. It held that the supreme court in the first district had jurisdiction to grant the injunction, so that it was not void. The opinion of Folger, J., discusses the doctrines which I have stated in the text: "In this state, since the adop-

joined under this doctrine may be equitable as well as legal.

§ 1372. The Same. Second Class — New Parties.— 2. A second possible case for injunction may arise under the codes in some of the states. It is suggested in the opinion

tion of the system of practice now existing, the equitable jurisdiction of a court to restrain proceedings at law in another court can be but seldom invoked. For there are but few courts, and they inferior, which have only a common-law jurisdiction. The courts of original jurisdiction are mostly possessed of both equitable and common-law powers, and they are, moreover, mostly of co-ordinate jurisdiction. So that it may have been well held that one court of equitable jurisdiction may not, as a usual procedure, restrain the proceedings in another court of equal powers. For one, as much as the other, has, in most cases, the means of doing exact justice to all the suitors before it, and may, as well as the other, afford to the suitor any remedy, equitable or legal, to which he is entitled, and in any proceeding consistent with its established rules and practice, though it would be too much to say that in no case can a court restrain the suitors in another court of co-ordinate powers. Thus the jurisdiction of a court of equity to interfere to prevent a multiplicity of suits, or to draw to one action cognate questions and interests sought to be litigated in many actions, is well established. But is it to be held that the exercise of this jurisdiction is thwarted when the numerous suits are divided among several courts of co-ordinate law and equity powers? The suit to bring to one judgment all the actions must be in one of the courts, and to make that suit effectual to the end sought, the power must be in that court to enjoin the parties to the suits in the co-ordinate courts from proceeding therein. An instance of the exercise of one branch of this power sanctioned by this court is found in the case of N. Y. & N. H. R. R. Co. v. Schuyler, 17 N. Y. 592. Nor is it without other precedent that a court of equity, by action instituted before it, may question the proceedings in another court of equity. Thus one court of equity has overhauled the decree of another court of equity for fraud, contrivance, or covin in the obtaining of it: Earl of Bandon v. Becher, 3 Clark & F. 479; Manaton v. Molesworth, 1 Eden, 25. If it may entertain an action for that purpose, in which its decree, if favorable to the moving party, will have the effect to forever restrain the execution of the decree, the validity of which is brought into question, why may it not, pending the suit before it, restrain, by temporary injunction, the execution and enforcement of that decree? If it may thus restrain the proceedings in another court of equity to *enforce* the decree of that court, may it not restrain the proceedings in that court to obtain the decree?" I remark that this consequence by no means necessarily follows. The reasons for attacking and setting aside a decree already obtained, on account of fraud, after the litigation is ended, do not necessarily apply to an interference with the litigation while pending in another court having full powers to deal with all questions which may arise. "We speak of it, not as a power usually to be exercised, but as one beyond the jurisdiction of the court. The affirm-

of Mr. Justice Folger, quoted in the foot-note, that whenever the decision of all the matters embraced within the equitable defense would require the presence of other parties besides those who are parties to the legal action, the defendant is not bound to set up the facts constituting his

ative answer to this query is found in the fact that it has done so: Jackson v. Leaf, 1 Jacob & W. 229–232; Clarke v. Earl of Ormonde, Jacob, 546; Earl of Newburg v. Wren, 1 Vern. 220, and notes; Vendall v. Harvey, Nels. 19–21; Booth v. Leycester, 3 Mylne & C. 459; Beckford v. Kemble, 1 Sim. & St. 7; Beauchamp v. Marquis of Huntley, Jacob, 546; Schuyler v. Pelissier, 3 Edw. Ch. 191, 192. But this ground of equitable jurisdiction, viz., that to restrain proceedings in a court of law, is not removed when the same court is clothed with powers both at law and in equity. Granted that since the conjunction in this state of law and equity powers in nearly all courts of original jurisdiction, one court may not, as a usual thing, interfere with the proceedings in another court co-ordinate in power, yet the jurisdiction to restrain proceedings at law remains. A court, upon its equity side, may enjoin its own suitors proceeding upon its law side. The only question can be as to the method in which it shall be done. Is the method this alone: that in the action on the law side of the court, the facts be set up by answer, and affirmative equitable relief being prayed for upon them, the action be transformed into an equitable one, and thus there be, though not formally, yet practically, an injunction upon the party plaintiff from enforcing his strict legal right, until there shall be a determination of the claim of the party defendants for equitable relief? In a case in which all parties and all interests necessary to a full and complete determination of the controversy were or could be brought before the court in the original action in a proper attitude to each other, there could be such a determination: Dobson v. Pearce, 12 N. Y. 156; 62 Am. Dec. 152; Despard v. Walbridge, 15 N. Y. 374; Chase v. Peck, 21 N. Y. 581. But this is not always practicable." It should be remembered that several of the state codes provide for bringing in all necessary new parties in such cases. "If it be said, as is said, that a court cannot restrain itself, the answer is, that a court of equity never sought or claimed to restrain a court of law, but did enjoin the suitors in it. If it be said that the court can act upon its suitors by way of restraint in the very action which they are then prosecuting before it, one answer is, that all the persons to be restrained and affected by injunction, temporary and perpetual, may not be parties to that action, and so not in the power of the court. And another answer is, that a party defendant may sometimes, for immediate or full remedy, need relief against as well a co-defendant in the original action as the plaintiff therein, and that he cannot always have relief against this co-defendant, based upon the allegations of new matter in his own answer, inasmuch as the co-defendant may not in that action have opportunity of taking and contesting an issue upon those allegations, and the transaction out of which the equity arises may be of too complicated a nature to be investigated on a motion in the same court for summary relief: Decker v. Judson, 16 N. Y. 439–450, per Denio, C. J.; Jones v. Grant, 10

equitable claim for relief as a defense to the legal action, but may, and indeed must, institute a separate equitable suit, and enjoin, if necessary, the further prosecution of the legal action. The resort, under such circumstances, to a second equitable suit and an injunction against the prior action at law, may be proper in the states whose codes of procedure make no provision whatever for bring-

Paige, 348. So that it may well be that in an action pending in a court of both law and equity powers, the tribunal may not be able to mete out full justice to the parties litigant in the action pending before it, without entertaining a cross-action, in which other facts shall be presented and other persons made parties, and in which last action it may be needful that an injunction order issue restraining the prosecution of the first." The codes of several states provide that, in addition to an "equitable defense" and a "counterclaim," one or more defendants may file a cross-complaint against any or all of the plaintiffs, and any or all of the co-defendants, and against additional parties, for the purpose of obtaining equitable relief connected with the subject-matter of the action.

The same general doctrine, including the same single exception of restraining a multiplicity of actions, is fully sustained by California decisions: Uhlfelder v. Levy, 9 Cal. 607, 614, 615; Crowley v. Davis, 37 Cal. 268, 269; Hockstacker v. Levy, 11 Cal. 76; Gorham v. Toomey, 9 Cal. 77; Anthony v. Dunlap, 8 Cal. 26; Rickett v. Johnson, 8 Cal. 34, 36; Revalk v. Kraemer, 8 Cal. 66, 71; 68 Am. Dec. 304; Chipman v. Hibbard, 8 Cal. 268, 270; Flaherty v. Kelly, 51 Cal. 145; Agard v. Valencia, 39 Cal. 292, 303; and see Cal. Civ. Code, sec. 3423, subd. 1.

The general doctrine of the text is also approved in Wisconsin: Platto v. Deuster, 22 Wis. 482; Farmers' etc. Bank v. Luther, 14 Wis. 96; State ex rel. Mills v. Kispert, 21 Wis. 387; Wilson v. Jarvis, 19 Wis. 597; and in Indiana: Ricker v. Pratt, 48 Ind. 73; Hardy v. Stone, 23 Ind. 597.

While the strong current of the authorities is in this direction, the decisions are not wholly uniform. For example, in Kentucky, the case of Dorsey v. Reese, 14 B. Mon. 127, goes to the full length of the old chancery methods, and declares: "There is nothing, however, contained in the code which precludes him [the defendant], if he fails to avail himself of this privilege [i. e., the provision allowing equitable defenses and counterclaims], and permits a judgment to go against him, from bringing an equitable action to obtain relief against the judgment."

It should be added that the codes in some of the states expressly require every cross-right in the shape of a counterclaim to be interposed as such by a defendant, and if he fails to do so, he cannot enforce it by direct action. This provision, of course, includes all cases of equitable affirmative relief which might be set up as an equitable defense in a legal action, since such defenses are a species of counterclaims. For example, see Minn. Code 1858, sec. 72; Lowry v. Hurd, 7 Minn. 356, 363. In some other states a similar provision is made applicable only to one class of counterclaims.

ing in the new parties requisite for a full and final determination of the defendant's equitable claim; but the necessity of such a proceeding is certainly confined to those states. The rule as thus suggested is expressly repudiated by some of the decisions which hold that the necessity of bringing in other parties, in order to a complete determination of the entire controversy, makes no difference in the operation of the general doctrine resulting from the provisions of the new procedure.[1] In several of the states, the codes of procedure expressly provide for this contingency, by enacting that when the decision upon equitable defenses or counterclaims requires the presence of new parties, such parties may be brought in.[2] The cross-complaint or cross-petition as authorized by the codes in certain states seems also to preclude the necessity of a separate suit and injunction in most instances, even for the purpose of preventing a multiplicity of actions.[3]

§ 1373. The Same. Third Class — No Affirmative Relief.— 3. There is another case which would seem to require a resort to an equitable suit and the injunction restraining a prior action at law in a portion of the states. Wherever the doctrine is settled that an "equitable defense," within the meaning of the codes, must consist of facts entitling the defendant to some equitable affirmative specific relief, and must be pleaded with a demand for such relief, and must result in the granting thereof, it would seem that facts constituting a defense in equity, though not at law, but which operate solely by way of defense, *defeating the plaintiff's recovery,* and do not entitle the defendant to any affirmative relief, could only be taken advantage of by a separate equitable suit and an injunction perpetually

[1] See the California cases cited in the last note.

[2] See, among others, the codes of Ohio, sec. 96; Kansas, sec. 97; Nebraska, sec. 103; Indiana, sec. 63; Iowa, sec. 2662. This provision clearly obviates the necessity of a resort to a separate suit, even if it does not prevent such resort under all circumstances.

[3] For example, see Cal. Code Civ. Proc., sec. 442.

restraining the action at law. Such facts do not, by its very definition, constitute a counterclaim, nor do they furnish an occasion for a "cross-complaint," which always involves affirmative relief. That there may be such defenses, constituting simply an *equitable* though not a legal *bar,* is undeniable; they were recognized by the former chancery jurisdiction; and their only mode of enforcement, prior to all legislation, was by suit in equity seeking as its only relief a perpetual injunction against the action at law.[1] It would seem to follow, as a necessary result, that if these defenses, operating only as an *equitable bar,* cannot be set up by answer as a defense under the codes, they must be enforced by a separate equitable suit to perpetually enjoin the action at law. Such a result furnishes a cogent reason for holding that the term "equitable defense" as used in the codes of procedure embraces all possible defenses which are valid upon equitable doctrines, and is not confined to those which entitle the defendant to affirmative relief.

[1] I have already shown that under the statute of 1854 the English law courts confined the "equitable pleas" allowed by the statute to this very species of equitable defense, which simply *barred* the action, and was equivalent, as the courts said, to the remedy of perpetual injunction: *Ante,* § 1367. One or two examples of such defenses will be sufficient to show their possible existence and to illustrate their nature. In an action at law for money had and received, the defendant might allege that he held and was entitled to the money by an equitable assignment; for example, that he held it under an order given by the person then entitled on the depositary of a future fund, non-existing at the time the order was given. These facts would show that the defendant was owner of the money in equity, though not at law; they would bar the plaintiff's right to recover; no affirmative relief would be necessary for the defendant; in fact, no affirmative relief would be possible. Again, in an action of trover to recover damages for the alleged conversion of chattels, the defendant might state that he was entitled to the chattels by virtue of an equitable assignment from the original owner, such as an order on his depositary, or a sale or mortgage of the chattels which were to be acquired in the future. This would be a perfect equitable defense, but would require no affirmative relief. Under the former system these defenses could not be set up in the action at law; the defendant would be driven to a separate suit in equity, in which the only relief asked or obtained would be a perpetual injunction against the action at law or against the judgment. For an illustration of such suits, see Burn v. Carvalho, 7 Sim. 109; 4 Mylne & C. 690; Carvalho v. Burn, 4 Barn. & Adol. 382; 1 Ad. & E. 883.

§ 1374. Some Illustrations of Equitable Defenses.—While it does not come within the purposes of this book to discuss the scope and effect of "equitable defenses," I have placed in the foot-note a number of well-considered and important cases which illustrate their operation.[1] They have been used most frequently in actions to recover possession of land, analogous to ejectment, and in actions by vendors in contracts for the sale of land, against their vendees. They have also been resorted to in actions upon mercantile contracts, in actions upon covenants, and in many other miscellaneous suits. These cases further show that the jurisdiction to restrain actions at law by injunction has become of very little importance, and almost obsolete, in the states where the reformed procedure prevails.

[1] In actions to recover possession of land: Heermans v. Robertson, 64 N. Y. 332; Hoppough v. Struble, 60 N. Y. 430; Crary v. Goodman, 12 N. Y. 266; 64 Am. Dec. 506; Bartlett v. Judd, 21 N. Y. 200; 78 Am. Dec. 131; Chase v. Peck, 21 N. Y. 581; Harrington v. Fortner, 58 Mo. 468; Hubble v. Vaughan, 42 Mo. 138; Collins v. Rogers, 63 Mo. 515; Maxwell v. Campbell, 45 Ind. 360; McMannus v. Smith, 53 Ind. 211; Hampson v. Fall, 64 Ind. 382; Hammond v. Perry, 38 Iowa, 217; Richardson v. Bates, 8 Ohio St. 257; McClane v. White, 5 Minn. 178; Guedici v. Boots, 42 Cal. 452; Ten Broeck v. Orchard, 74 N. C. 409. In actions by vendors against vendees: Cavalli v. Allen, 57 N. Y. 508; Duffy v. O'Donovan, 46 N. Y. 223, 227; Leaird v. Smith, 44 N. Y. 618; Hubbell v. Von Schoening, 49 N. Y. 326, 330; Giles v. Austin, 62 N. Y. 486; Cythe v. La Fontain, 51 Barb. 186; Ingles v. Patterson, 36 Wis. 373; Onson v. Cown, 22 Wis. 329; Harris v. Vinyard, 42 Mo. 568; Petty v. Malier, 15 B. Mon. 591, 604; Creager v. Walker, 7 Bush, 1; Talbert v. Singleton, 42 Cal. 390; Bruck v. Tucker, 42 Cal. 346; Hughes v. Davis, 40 Cal. 117. In actions on mercantile contracts: Seeley v. Engell, 13 N. Y. 542; New York Cent. Ins. Co. v. Nat. Protec. Ins. Co., 14 N. Y. 85; Despard v. Walbridge, 15 N. Y. 374; Holland v. Johnson, 51 Ind. 346; Hinkle v. Margerum, 50 Ind. 240; Struman v. Robb, 37 Iowa, 311; Hablitzel v. Latham, 35 Iowa, 550; Becker v. Sandusky City Bank, 1 Minn. 311. In miscellaneous actions for damages: Haire v. Baker, 5 N. Y. 357; Pitcher v. Hennessey, 48 N. Y. 415; Dobson v. Pearce, 12 N. Y. 156; 62 Am. Dec. 152; Pennoyer v. Allen, 51 Wis. 360; 50 Wis. 308. As to affirmative relief, see Massie v. Stradford, 17 Ohio St. 596; Klonne v. Bradstreet, 7 Ohio St. 322; Quebec Bank v. Weyand, 30 Ohio St. 126; Reed v. Newton, 22 Minn. 541; Kellogg v. Aherin, 48 Iowa, 299; Hatcher v. Briggs, 6 Or. 31; Tucker v. McCoy, 3 Col. 284; Mills v. Buttrick, 4 Col. 53, 123; Douglas v. Haberstro, 25 Hun, 262.

THIRD GROUP.

REMEDIES WHICH INDIRECTLY ESTABLISH OR PROTECT INTERESTS AND PRIMARY RIGHTS, EITHER LEGAL OR EQUITABLE.

CHAPTER FIRST.

REFORMATION AND CANCELLATION.

ANALYSIS.

§ 1375. General nature and object.
§ 1376. Reformation and re-execution of instruments.
§ 1377. Cancellation, surrender up, or discharge of instruments.

§ 1375. **General Nature and Object.**—The ultimate object of the remedies belonging to this group is the establishment or protection of interests, estates, and primary rights; but this object is accomplished *indirectly*. While these remedies are not so completely ancillary as interpleader and receivership, yet they are to a certain extent auxiliary. They do not, like a specific performance, or the execution of a trust, or an assignment of dower, or partition of land, operate directly and immediately to establish the plaintiff's title, and to confer upon him the complete dominion over his estate,— the ultimate relief which he seeks. Their effect in establishing his ultimate dominion is indirect. They are often used as the preparatory step which enables him to obtain, sometimes in the same action, and sometimes in a subsequent suit, the ultimate remedy which finally establishes his rights or obligations, or restores him to the full enjoyment of his estate. The reformation of a policy of insurance is not a final remedy; but it establishes the real

contract, and thus enables the assured to recover the amount actually due according to the terms of that contract. The reformation of a deed does not directly restore the grantee to the dominion and possession of the land which had been omitted; but it places him in a position which enables him, if necessary, to assert his dominion and recover the possession. The cancellation of a deed does not of itself *directly* establish the plaintiff's title and put him in possession of the land, but it enables him, if necessary, to assert his title and obtain the possession. These remedies may be obtained on behalf of either a legal or an equitable interest, by either a legal or an equitable owner. The remedies constituting this group are the two following: reformation or re-execution of instruments, and rescission, cancellation, surrender up, or discharge of instruments.[1] Since they are chiefly occasioned by fraud or mistake, the general doctrines and rules determining the jurisdiction to grant them, and regulating their use, have already been fully examined in the preceding volume.[2] In the present chapter I merely collect and arrange the classes of cases in which the jurisdiction will be or will not be exercised.

§ 1376. **Reformation and Re-execution of Instruments.**— This subject has already been treated under the head of

[1] Reformation and re-execution are in fact one and the same remedy, depending upon the same rules; and the same is true of rescission, cancellation, surrender up, and discharge. The decree for cancellation generally includes a direction for a surrender up, and, if necessary, for a discharge of record.

[2] See vol. 2, §§ 838–871 (on mistake); §§ 872–921 (on actual fraud); and §§ 922–974 (on constructive fraud). A large number of cases cited in these chapters illustrate the remedies of "reformation" and "cancellation." In particular, see, as to jurisdiction to grant the relief of reformation or of cancellation on account of mistake, and the conditions of fact which must exist, §§ 870, 871, and cases in notes. As to cancellation on account of fraud, see §§ 910–921; English doctrine: § 912. The American doctrine: § 914. Incidents of the relief, what is required of the plaintiff as a condition to granting the relief: §§ 915–917. Persons against whom granted: § 918. Illustrations: §§ 919–921.

Mistake, and little more need here be said.[1] Equity has jurisdiction to reform written instruments in but two well-defined cases: 1. Where there is a mutual mistake,— that is, where there has been a meeting of minds,— an agreement actually entered into, but the contract, deed, settlement, or other instrument, in its written form, does not express what was really intended by the parties thereto; and 2. Where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties.[2] In such cases the instrument may be made to conform to the agreement or transaction entered into according to the intention of the parties. The conditions of fact giving rise to the exercise of the jurisdiction to grant reformation are numerous. Almost all written instruments may be reformed when a proper occasion is furnished. The following are among the most important:

1 Vol. 2, §§ 838–871. The remedy of reformation virtually includes that of re-execution, since, in many cases, the latter follows as an incident to the former. In some instances the mistake occurs only in the execution: See Miller v. Davis, 10 Kan. 541; Heaton v. Fryberger, 38 Iowa, 185; Parlin v. Stone, 1 McCrary, 443. Equity has, however, a special jurisdiction to decree the re-execution of such instruments as deeds which have become accidentally lost or destroyed, on the ground that otherwise the plaintiff's title would be defective or embarrassed: Bennett v. Ingoldsby, Finch, 262; Cummings v. Coe, 10 Cal. 529; Hoddy v. Hoard, 2 Ind. 474; 54 Am. Dec. 456; and see Clarke v. Featherston, 32 Ind. 142.

2 Vol. 2, §§ 845–850, 852–856, 870, and cases cited. See also the following additional cases: Kilmer v. Smith, 77 N. Y. 226; 33 Am. Rep. 613; Albany Sav. Inst. v. Burdick, 87 N. Y. 40; Paine v. Upton, 87 N. Y. 327; 41 Am. Rep. 371; Arthur v. Homestead F. Ins. Co., 78 N. Y. 462; 34 Am. Rep. 550; Ford v. Joyce, 78 N. Y. 618; Steinbach v. Relief F. Ins. Co., 77 N. Y. 498; 33 Am. Rep. 655; Whittemore v. Farrington, 76 N. Y. 452; Moran v. McLarty, 75 N. Y. 25; Paine v. Jones, 75 N. Y. 593; Ramsey v. Smith, 32 N. J. Eq. 28; Real Estate Trust Co. v. Balch, 13 Jones & S. 528; Robertson v. Walker, 51 Ala. 484; Sutherland v. Sutherland, 69 Ill. 481; Evarts v. Steger, 5 Or. 147; Bradford v. Bradford, 54 N. H. 463; Botsford v. McLean, 42 Barb. 445; 45 Barb. 478; Snell v. Insurance Co., 98 U. S. 85. As to laches, carelessness, and the like, cutting off rights of remedy, see Sable v. Maloney, 48 Wis. 331; McFadden v. Rogers, 70 Mo. 421; Snyder v. Ives, 42 Iowa, 157; Nicoll v. Mason, 49 Ill. 358; Hutson v. Fumas, 31 Iowa, 154; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; McIntosh v. Saunders, 68 Ill. 128; Toops v. Snyder, 70 Ind. 554; Witthaus v. Schack, 57 How. Pr. 310.

Deeds of conveyance,[3] mortgages,[4] leases,[5] policies of insurance,[6] bonds of various kinds,[7] negotiable instruments,[8]

[3] The cases of reformation of deeds are many. As illustrations of the various questions which may arise, see Harris v. Pepperell, L. R. 5 Eq. 1; Bloomer v. Spittle, L. R. 13 Eq. 427; White v. White, L. R. 15 Eq. 247; Gillespie v. Moon, 2 Johns. Ch. 585; 7 Am. Dec. 559; Clayton v. Freet, 10 Ohio St. 544; Deford v. Mercer, 24 Iowa, 118; 92 Am. Dec. 460 (quitclaim); Mattingly v. Speak, 4 Bush, 316; Lestrade v. Barth, 19 Cal. 660; Brown v. Balen, 33 N. J. Eq. 469; Weston v. Wilson, 31 N. J. Eq. 51; Day v. Day, 84 N. C. 408; Sawyer v. Hanson, 48 Wis. 611; Kilmer v. Smith, 77 N. Y. 226; 33 Am. Rep. 613; Jackson v. Andrews, 59 N. Y. 244; Bush v. Hicks, 60 N. Y. 298; Albany Sav. Inst. v. Burdick, 87 N. Y. 40; Crippen v. Baums, 15 Hun, 136; Johnson v. Johnson, 8 Baxt. 261; Blackburn v. Randolph, 33 Ark. 119; Michel v. Tinsley, 69 Mo. 442; Baker v. Massey, 50 Iowa, 399; Ballentine v. Clark, 38 Mich. 395; Pasman v. Montague, 30 N. J. Eq. 385; Fly v. Brooks, 64 Ind. 50; Nicholson v. Caress, 59 Ind. 39; Gerald v. Elley, 45 Iowa, 322; Parish v. Scott, 10 Heisk. 438; Dart v. Barbour, 32 Mich. 267; Cummings v. Freer, 26 Mich. 128; Burr v. Hutchinson, 61 Me. 514; Huss v. Morris, 63 Pa. St. 367; Blakeman v. Blakeman, 39 Conn. 320. *Voluntary deeds:* Froman v. Froman, 13 Ind. 317; Randall v. Ghent, 19 Ind. 271; Hunt v. Frazier, 6 Jones Eq. 90. *Deeds of married women:* Heaton v. Fryberger, 38 Iowa, 185; Leonis v. Lazzarovich, 55 Cal. 52; Styers v. Robbins, 76 Ind. 547; Purcell v. Goshorn, 17 Ohio, 105; 49 Am. Dec. 448.

[4] Parlin v. Stone, 1 McCrary, 443; Miller v. Davis, 10 Kan. 541; Albany Sav. Inst. v. Burdick, 87 N. Y. 40; Coe v. N. J. Midland R'y, 31 N. J. Eq. 105; Wilson v. King, 27 N. J. Eq. 374; Wheeler v. Kirtland, 23 N. J. Eq. 13; Petesch v. Hambach, 48 Wis. 443; First Nat. Bank v. Gough, 61 Ind. 147; Wilson v. Stewart, 63 Ind. 294; Exchange Bank v. Russell, 50 Mo. 531; Schwickerath v. Cooksey, 53 Mo. 75; Baskins v. Calhoun, 45 Ala. 582; Alexander v. Rea, 50 Ala. 450; Goodman v. Randall, 44 Conn. 321; Milmine v. Burnham, 76 Ill. 362; Quivey v. Baker, 37 Cal. 465; Ruhling v. Hackett, 1 Nev. 360. *Deeds of trust:* Allen v. McGaughey, 31 Ark. 252; Young v. Coleman, 43 Mo. 179; Haynes v. Seachrest, 13 Iowa, 455.

[5] Henry v. Smith, 76 N. C. 311; Mays v. Dwight, 82 Pa. St. 462; Murray v. Dake, 46 Cal. 644; Campbell v. Hatchett, 55 Ala. 548.

[6] Knox v. Lycoming F. Ins. Co., 50 Wis. 671; Hearn v. Equitable etc. Ins. Co., 4 Cliff. 192; Dean v. Equitable F. Ins. Co., 4 Cliff. 575; Brugger v. State Invest. Ins. Co., 5 Saw. 304; Hay v. Star F. Ins. Co., 77 N. Y. 235; 33 Am. Rep. 607; Mercantile Ins. Co. v. Jaynes, 87 Ill. 199; Mead v. Westchester etc. Ins. Co., 64 N. Y. 453; National Traders' Bank v. Ocean Ins. Co., 62 Me. 519; Keith v. Globe Ins. Co., 52 Ill. 518; 4 Am. Rep. 634; Miaghan v. Hartford F. Ins. Co., 12 Hun, 321; Mackenzie v. Coulson, L. R. 8 Eq. 368.

[7] Emery v. Mohler, 69 Ill. 221; Evarts v. Steger, 5 Or. 147; Craft v. Dickens, 78 Ill. 131; State v. Frank's Adm'r, 51 Mo. 98; Sehwear v. Haupt, 49 Mo. 225; Pickersgill v. Lahens, 15 Wall. 140; Garnar v. Bird, 57 Barb. 277.

[8] Botsford v. McLean, 42 Barb. 445; 45 Barb. 478; Talley v. Courtney, 1 Heisk. 715; Gammage v. Moore, 42 Tex. 170; Ottenheimer v. Cook, 10 Heisk.

marriage and family settlements,[9] and compromises.[10] Judgments and other records may also be corrected.[11] Other instances are given in the foot-note.[12]

§ 1377. Cancellation and Surrender up or Discharge of Instruments.—The jurisdiction of equity to grant the remedy of cancellation exists and will always be exercised when it is necessary to protect or maintain equitable primary estates, interests, or rights; where, however, the estate, interest, or right is legal, the jurisdiction always *exists,* but its *exercise* depends upon the adequacy of the legal remedies,—a party being left to his affirmative or defensive remedy at law, where full and complete justice can thereby be done.[1] The occasions giving rise to the exercise of this

309; Loomis v. Freer, 4 Ill. App. 547; Potter v. Potter, 27 Ohio St. 84; Druiff v. Lord Parker, L. R. 5 Eq. 131.

[9] See vol. 2, §§ 850, 855, 871. See also the following additional cases: Clark v. Girdwood, L. R. 7 Ch. Div. 9; Lovesy v. Smith, L. R. 15 Ch. Div. 655; Welman v. Welman, L. R. 15 Ch. Div. 570; Hanley v. Pearson, L. R. 13 Ch. Div. 545; Lister v. Hodgson, L. R. 4 Eq. 30.

[10] See vol. 2, §§ 850, 855, 871, and cases cited.

[11] Vol. 2, § 871; Partridge v. Harrow, 27 Iowa, 96; 99 Am. Dec. 643; Snyder v. Ives, 42 Iowa, 157; Cohen v. Dubose, Harp. Eq. 102; 14 Am. Dec. 709 (verdict).

[12] Moran v. McLarty, 75 N. Y. 25 (assignment of mortgage); Kelley v. McKinney, 5 Lea, 164 (contract for sale of land); Stafford v. Fetters, 55 Iowa, 484 (indorsement of note); Hervey v. Savery, 48 Iowa, 313 (release of mortgage); Mastelar v. Edgarton, 44 Iowa, 495 (agreement establishing highway); Thomas v. Raymond, 4 S. C. 347 (military order; not corrected). As to reforming and correcting mistakes in wills, see vol. 2, § 871.

[1] Vol. 1, §§ 219–221; vol. 2, §§ 911, 914; Globe Mut. L. Ins. Co. v. Reals, 79 N. Y. 202; Ryerson v. Willis, 81 N. Y. 277 (when mortgage will not be canceled for failure of consideration); Kelly v. Christal, 81 N. Y. 619 (when a judgment will not be set aside); United States v. Throckmorton, 98 U. S. 61 (the same). In the exercise of the remedy of cancellation instruments are almost necessarily directed to be "delivered up." "Delivery up," under these circumstances, can hardly be called a distinct remedy. In England, courts of equity have entertained jurisdiction from the earliest times to decree instruments of a peculiar and exceptional character—as muniments of title—to be delivered up to persons entitled to their custody and possession. The reasons for the exercise of this jurisdiction do not apply in this country: Armitage v. Wadsworth, 1 Madd. 189, 192; Jackson v. Butler, 2 Atk. 306; 9 Mod. 297; Grey v. Cockeril, 2 Atk. 114; Harrison v. Southcote, 1 Atk. 528, 540; Banbury v. Briscoe, 2 Cas. Ch. 42; Ford v. Peering, 1 Ves. 72; Duncombe v. Mayer, 8 Ves. 320; Francis v. Francis, 2 De Gex, M. & G.

jurisdiction are mistake, fraud, and other instances where enforcing instruments or agreements would be inequitable or unjust.[2] A doubt was formerly entertained as to whether a court of equity ought to exercise its jurisdiction to order instruments absolutely void at law, and not merely voidable, to be delivered up and canceled, since the legal remedy of a party was adequate and complete, and no case was presented for equitable interference;[3] but it is now well settled that jurisdiction will be exercised in such cases,[4] except where the invalidity of the instrument is apparent on its face.[5] The particular instances in which this remedy is most often given are instruments concerning land,[6] and

73; Dunn v. Dunn, 7 De Gex, M. & G. 25; Turner v. Letts, 7 De Gex, M. & G. 243; Newton v. Newton, L. R. 6 Eq. 135; Thorpe v. Holdsworth, L. R. 7 Eq. 139; Wilson's Case, L. R. 12 Eq. 516, 521; Waldy v. Gray, L. R. 20 Eq. 238; Jenner v. Morris, L. R. 1 Ch. 603; Heath v. Crealock, L. R. 10 Ch. 22; Leathes v. Leathes, L. R. 5 Ch. Div. 221; James v. Rumsey, L. R. 11 Ch. Div. 398; In re Morgan, L. R. 18 Ch. Div. 93; In re Cooper, L. R. 20 Ch. Div. 611.

[2] The various rules as to when jurisdiction will be exercised, and the evidence necessary, in cases of fraud and mistake, have already been discussed, and the reader is referred to the sections on those subjects.

[3] Ryan v. Mackmath, 3 Brown Ch. 15; Hilton v. Barrow, 1 Ves. 284; Bromley v. Holland, 5 Ves. 610, 618; Franco v. Bollon, 3 Ves. 368.

[4] Forged deeds: In re Cooper, L. R. 20 Ch. Div. 611; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474. For illustrations of the general rule, see Hamilton v. Cummings, 1 Johns. Ch. 517, 520, and cases cited; Lord St. John v. Lady St. John, 11 Ves. 526; Jervis v. White, 7 Ves. 413; Simpson v. Lord Howden, 3 Mylne & C. 97, 102; Mayor of Colchester v. Lowten, 1 Ves. & B. 226, 244; Bromley v. Holland, 7 Ves. 3, 16; Hayward v. Dimsdale, 17 Ves. 111; Chennel v. Churchman, 3 Brown Ch. 16, note; Minshaw v. Jordan, 3 Brown Ch. 16, note; Pierce v. Webb, 3 Belt's Brown Ch. 16, note 2; Lisle v. Liddle, 3 Anstr. 649; Ryan v. Mackmath, cited 13 Ves. 584; Jackman v. Mitchell, 13 Ves. 581; Peirsoll v. Elliott, 6 Pet. 95, 98; and see cases cited in subsequent notes under this section.

[5] Gray v. Mathias, 5 Ves. 286; Simpson v. Lord Howden, 3 Mylne & C. 97; Smyth v. Griffin, 13 Sim. 245; Bromley v. Holland, 7 Ves. 3, 21; Peirsoll v. Elliott, 6 Pet. 95, 98; Van Doren v. Mayor etc., 9 Paige, 388. See § 1399, in regard to removing deeds void on their faces, as being clouds on title. As to removing cloud, see also Strusburgh v. Mayor etc., 87 N. Y. 452; Dederer v. Voorhies, 81 N. Y. 153; Wells v. Buffalo, 80 N. Y. 253; Townsend v. Mayor etc., 77 N. Y. 542 (void tax).

[6] *Deeds:* The following of the many cases will serve as illustrations: Blenkinsopp v. Blenkinsopp, 1 De Gex, M. & G. 495; Harrison v. Guest, 6

negotiable paper before maturity,[7] the legal remedies in these cases being, as a general rule, inadequate. The

De Gex, M. & G. 424; Wright v. Vanderplank, 8 De Gex, M. & G. 133; Gresley v. Mousley, 4 De Gex & J. 78; Nortcliffe v. Warburton, 4 De Gex, F. & J. 449; Clark v. Malpas, 4 De Gex, F. & J. 401; Baker v. Monk, 4 De Gex, J. & S. 388; Broun v. Kennedy, 4 De Gex, J. & S. 217; De Hoghton v. Money, L. R. 1 Eq. 154; Lister v. Hodgson, L. R. 4 Eq. 30; Heath v. Crealock, L. R. 10 Ch. 22; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474; Reid v. Burns, 13 Ohio St. 49; Hamilton v. Batlin, 8 Minn. 403; 83 Am. Dec. 787; Woodruff v. Garner, 27 Ind. 4; 89 Am. Dec. 477; Shewmake v. Williams, 54 Ga. 206; Lindsey v. Lindsey, 50 Ill. 79; 99 Am. Dec. 489; Bayliss v. Williams, 6 Cold. 440; Parrott v. Parrott, 1 Heisk. 681; Bogle v. Hammons, 2 Heisk. 136; Hyer v. Little, 20 N. J. Eq. 443; Warnock v. Campbell, 25 N. J. Eq. 485; Mead v. Coombs, 26 N. J. Eq. 173; Lyons v. Van Riper, 26 N. J. Eq. 337; Yard v. Yard, 27 N. J. Eq. 114; Turner v. Turner, 44 Mo. 535; Davis v. Fox, 59 Mo. 125; Hollocher v. Hollocher, 62 Mo. 267; Davis v. Luster, 64 Mo. 43; Dean v. Younell's Adm'r, 8 Wall. 14, note; Murphy v. Paynter, 1 Dill. 333; Allore v. Jewell, 94 U. S. 506; Barfield v. Price, 40 Cal. 535; Hearst v. Pujol, 44 Cal. 230; Hightower v. Nuber, 26 Ark. 604; Freeman v. Reagan, 26 Ark. 373; Seymour v. Belding, 83 Ill. 222; Stone v. Wilbern, 83 Ill. 105; Hough v. Cook etc. Co., 73 Ill. 23; 24 Am. Rep. 230; Wiley v. Ewalt, 66 Ill. 26; Pickerell v. Morss, 97 Ill. 220; Walton v. Tusten, 49 Miss. 569; Case v. Case, 26 Mich. 484; Ritter v. Ritter, 42 Mich. 108; Rath v. Vanderlyn, 44 Mich. 597; Smith v. Rowley, 66 Barb. 502; Larsen v. Burke, 39 Iowa, 703; Montgomery v. Shockey, 37 Iowa, 107; Benson v. Cowell, 52 Iowa, 137; Cook v. Moore, 39 Tex. 255; Mattair v. Payne, 15 Fla. 682; Morrison v. Morrison, 27 Gratt. 190; Stearns v. Beckham, 31 Gratt. 379; Biglow v. Leabo, 8 Or. 147; Bishop v. Aldrich, 48 Wis. 619. *Mortgages:* Spurgin v. Traub, 65 Ill. 170; Burlington Tp. v. Cross, 15 Kan. 74; Dolan v. Kehr, 9 Mo. App. 351; Connelly v. Fisher, 3 Tenn. Ch. 382; Schenck v. O'Neill, 23 Hun, 209; Foote v. Beecher, 78 N. Y. 155; Schaper v. Schaper, 84 Ill. 603; Starr v. Ellis, 6 Johns. Ch. 393. *Leases:* Wood v. Hubbell, 10 N. Y. 479; Field v. Herrick, 5 Ill. App. 54; Arnold v. Bright, 41 Mich. 207; Wilson v. Deen, 74 N. Y. 531; Watson etc. Co. v. Casteel, 68 Ind. 476. *Contracts concerning lands:* Roy v. Haviland, 12 Ind. 364; Matlock v. Todd, 25 Ind. 128; Wambaugh v. Bimer, 25 Ind. 368; Brainard v. Holsaple, 4 G. Greene, 485; McGuire v. Bowman, 6 Bush, 550; Belknap v. Sealey, 14 N. Y. 143; 67 Am. Dec. 120; Young v. Hughes, 32 N. J. Eq. 372.

[7] Minshaw v. Jordan, 3 Brown Ch. 17, note; Jervis v. White, 7 Ves. 413; Bishop of Winchester v. Fournier, 2 Ves. Sr. 445; Wynne v. Callander, 1 Russ. 293; Town of Springport v. Teutonia Sav. Bank, 75 N. Y. 397 (cancellation of bonds illegally issued in name of a town, to avoid a multiplicity of suits; a very important decision); Town of Wellsborough v. N. Y. & C. R. R., 76 N. Y. 182 (the same); Western R. R. v. Bayne, 75 N. Y. 1 (surrender up of securities); Gould v. Cayuga Co. etc. Bank, 86 N. Y. 75; Metler's Adm'rs v. Metler, 18 N. J. Eq. 270; 19 N. Y. 457; Hughes v. United States, 4 Wall. 232; Ferguson v. Fisk, 28 Conn. 501; Lewis v. Tobias, 10 Cal. 574; Smith v. Smith's Adm'r, 30 N. J. Eq. 564; Crowe v. Peters, 63 Mo. 429;

remedy is also frequently given in case of bonds,[8] policies of insurance,[9] settlements and compromises,[10] awards,[11] and judgments.[12]

Hosleton v. Dickinson, 51 Iowa, 244; Fuller v. Percival, 126 Mass. 381; Fowler v. Palmer, 62 N. Y. 533. An injunction against transferring is often given in such cases.

[8] Jackman v. Mitchell, 13 Ves. 581; Hamilton v. Cummings, 1 Johns. Ch. 517; Town of Venice v. Woodruff, 62 N. Y. 462; 20 Am. Rep. 495; Town of Springport v. Teutonia Sav. Bank, 75 N. Y. 397; Town of Wellsborough v. N. Y. & C. R. R., 76 N. Y. 182; Western R. R. v. Bayne, 75 N. Y. 1; Gould v. Cayuga Co. etc. Bank, 86 N. Y. 75. These cases overrule the decision in Town of Venice v. Woodruff.

[9] Whittingham v. Thornburgh, 2 Vern. 506; Traill v. Baring, 4 De Gex, J. & S. 318; Commercial etc. Ins. Co. v. McLoon, 14 Allen, 351; Insurance Co. v. Bailey, 13 Wall. 616; Derrick v. Lamar Ins. Co., 74 Ill. 404; Life Ins. Co. v. Bangs, 103 U. S. 780; Tabor v. Michigan etc. Ins. Co., 44 Mich. 324; Globe etc. Ins. Co. v. Reals, 48 How. Pr. 502; 79 N. Y. 202.

[10] Vol. 2, §§ 850, 855, 875.

[11] Vol. 2, §§ 871, 919.

[12] Vol. 2, §§ 871, 914, 919. Rescission of a fraudulent sale under a decree: Fisher v. Hersey, 78 N. Y. 387. A judgment will not be set aside on the ground of fraud, when the very fraud alleged was tried and passed upon by the issues of the former action: United States v. Throckmorton, 98 U. S. 61; nor when the facts could have been set up as a complete defense in the former action: Kelly v. Christal, 81 N. Y. 619. For further illustrations of cancellation, see vol. 2, pp. 410, 411, in note under § 914. **As to canceling conveyances in fraud of creditors, see vol. 2, §§ 966–974.**

FOURTH GROUP.

REMEDIES BY WHICH ESTATES, INTERESTS, AND PRIMARY RIGHTS, EITHER LEGAL OR EQUITABLE, ARE DIRECTLY DECLARED, ESTABLISHED, OR RECOVERED, OR THE ENJOYMENT THEREOF FULLY RESTORED.

CHAPTER FIRST.

SUITS BY WHICH PURELY LEGAL ESTATES ARE ESTABLISHED, AND THE ENJOYMENT THEREOF RECOVERED: NAMELY, ASSIGNMENT OF DOWER, ESTABLISHMENT OF DISPUTED BOUNDARIES, PARTITION OF LAND, AND OF PERSONAL PROPERTY.

ANALYSIS.

§ 1378. General nature and object of this group.
§ 1379. Nature and object of the first class.
§§ 1380–1383. Assignment of dower.
§ 1380. Legal remedies.
§ 1381. Origin and grounds of the equitable jurisdiction.
§ 1382. The jurisdiction now concurrent.
§ 1383. Exclusive jurisdiction over dower in equitable estates.
§ 1384. Establishment of disputed boundaries.
§ 1385. The same; equitable incidents and grounds.
§§ 1386–1390. Partition of lands.
§ 1386. Common law remedy.
§ 1387. Equitable jurisdiction and remedies.
§ 1388. The title of the plaintiff.
§ 1389. Mode of partition.
§ 1390. Partition by means of a sale.
§ 1391. Partition of personal property.
§ 1392. The same; issue of title.

§ 1378. **General Nature and Object of This Group.**— All the remedies belonging to this group have one most important distinctive feature in common, which is apparent

upon even a slight examination. In all of them the estate or interest of the complaining party, whether it be legal or equitable, is *directly* established or recovered, or the enjoyment thereof is *directly* restored. These remedies are not, therefore, provisional or auxiliary, but they are, for the purposes of the complaining party, as truly final or ultimate reliefs as is the judgment in an action of ejectment or of replevin.[1] The estate, interest, or primary right to be established or recovered, or fully enjoyed by their means, may be either legal or equitable; and when it is equitable, the establishment *may* consist in clothing the plaintiff with the legal estate.[2] The remedies composing this group are separated, by a natural line of division, into *three* general classes, namely: 1. Suits by which purely legal estates are established, and the enjoyment thereof recovered; 2. Suits by which some general right, either legal or equitable, is established; and 3. Suits by which some particular estate or interest, either legal or equitable, is established.

§ 1379. **Nature and Object of the First Class.**— Since the particular cases belonging to this class are primarily adapted to purely legal interests, the common law gives similar

[1] This is manifestly so in "assignment of dower," "settlement of disputed boundaries," and "partition of land," since in each of these instances the plaintiff establishes his individual right to and obtains sole possession of a specific tract of land, and in "partition of personal property," he procures the same with respect to specific chattels. The statement is no less true of the other suits included within this group. In a suit to construe a will, estates in specific property are directly established; in suits to quiet title, the very object of the judgment is to declare and establish the plaintiff's legal or equitable estate in some specific property, and perhaps to convert his equitable estate into a legal one. Even in suits to remove a cloud from title, although the relief is often obtained by means of a cancellation, yet from the nature of the whole proceeding, the plaintiff's estate is thereby established, and he is left in its full enjoyment. In strict foreclosures of mortgages or pledges, and in redemptions of mortgages or pledges, the plaintiff plainly establishes his estate in, and secures his possession of, the specific land or chattels, free from any claim of the defendant. However much these remedies may differ in appearance, they all have this same *essential* element which brings them within the same group.

[2] As in some statutory suits to quiet title, and some suits to remove a cloud from title.

relief by means of appropriate legal actions. The jurisdiction of equity was based wholly upon the superiority of the equitable methods and procedure; and while the equitable jurisdiction in cases of dower and partition has become so established that it has almost displaced the legal remedies, that of settling disputed boundaries still requires the presence of some special equitable incident or circumstance.[1] I purpose to state the general doctrines and rules which regulate the jurisdiction to grant these remedies, and determine the circumstances under which and the parties between whom it will be exercised.

§ 1380. **Assignment of Dower — Legal Remedies.**— The right known as the wife's right of dower was purely legal, and was asserted at law through the writ of right of dower, and the writ of dower *unde nihil habet,* both of which were in the nature of real actions. As early as the reign of Queen Elizabeth, courts of equity began to assume jurisdiction over cases of dower, but only tentatively, and as ancillary to proceedings at law.[1] This jurisdiction, originally narrow and auxiliary, has, by the course of decision, and on familiar equitable principles, been expanded to the extent of affording complete relief between the parties.

§ 1381. **Origin and Grounds of the Equitable Jurisdiction.**— Equitable interposition in cases of dower was at first invoked for the removal of impediments in the way of recovery at law. As the title deeds to real estate were held by heirs, devisees, or trustees, it would be important, and even necessary, for the widow, on the event of a contest of her dower, to resort to equity, for the purpose of ascertaining the lands of which her husband had been seised during marriage. To accomplish this purpose, a bill of discovery would be entertained in equity; and where the land of the husband was an undivided interest in a greater portion, equity would decree a partition in aid of the assignment

§ 1379, [1] Under all ordinary circumstances, the action of ejectment is an adequate remedy by which to settle disputed claims to legal titles and estates.

§ 1380, [1] Wild v. Wells, 1 Dick. 3; Toth. 82.

to the widow of her dower.[1] This jurisdiction was, in its earlier stages, strictly auxiliary; and if no obstacle in the way of recognition and assignment of dower at law was disclosed, the equitable proceedings would be arrested.[2] The equitable jurisdiction, having once attached, was not slow in maturing so as to confer full relief. When the widow came into equity for a discovery respecting the title deeds to her husband's estate, which were in the hands of the heir, it was held that she should have complete relief.[3] If her title to dower was denied, it would be incumbent upon her to establish such title at law. Equity would, for that purpose, retain the bill for a reasonable time, and upon the determination of the issue at law in the widow's favor, would proceed to administer final relief.[4]

§ 1382. **The Jurisdiction Now Concurrent.**— Although it was thus, at one time, supposed that the jurisdiction of equity was ancillary, and could not attach in the absence of impediments at law, it is now well settled that courts of equity have concurrent jurisdiction in cases of legal dower, or dower in legal estates.[1] The advantages of the

§ 1381, [1] Moor v. Black, Cas. t. Talb. 126.

§ 1381, [2] Shute v. Shute, Prec. Ch. 111; Wallis v. Everard, 3 Ch. Rep. 161.

§ 1381, [3] Curtis v. Curtis, 2 Brown Ch. 620, 631, 632.

§ 1381, [4] Curtis v. Curtis, *supra;* Mundy v. Mundy, 2 Ves. 122, 128; D'Arcy v. Blake, 2 Schoales & L. 387; Swaine v. Perine, 5 Johns. Ch. 482; 9 Am. Dec. 318; Hartshorne v. Hartshorne, 2 N. J. Eq. 349; Rockwell v. Morgan, 13 N. J. Eq. 384; Wells v. Beall, 2 Gill & J. 458. And assuming the widow's title to be established or conceded, equity will not only assist her by way of discovery and assignment, but will decree her a due share of the mesne profits, and this, not from the time of the demand merely, but from the time when her title accrued: Dormer v. Fortescue, 3 Atk. 124, 130; Chase's Case, 1 Bland, 206; 17 Am. Dec. 277; Wells v. Beall, 2 Gill & J. 458; Keith v. Trapier, Bail. Eq. 63; Hazen v. Thurber, 4 Johns. Ch. 604.

§ 1382, [1] In a leading case the question was presented on the pleadings, which failed to disclose any impediment in the way of a proceeding at law, but the court determined in favor of the jurisdiction: Mundy v. Mundy, 2 Ves. 122. And such is now the established doctrine in England and in the United States: Pulteney v. Warren, 6 Ves. 73, 89; Strickland v. Strickland, 6 Beav. 77; Herbert v. Wren, 7 Cranch, 370; Powell v. Monson etc. Mfg. Co., 3 Mason, 347; Hazen v. Thurber, 4 Johns. Ch. 604; Swaine v. Perine, 5 Johns. Ch. 482; 9 Am. Dec. 318; Badgley v. Bruce, 4 Paige, 98; Hartshorne v. Hartshorne, 2 N. J. Eq. 349.

equitable procedure are obvious. An outstanding term could be removed and satisfied;[2] a partition in the case of undivided interests could be decreed, and an account could be taken;[3] fraudulent conveyances could be canceled;[4] and antagonistic claims to the subject-matter could be determined without multiplicity of suits.[5] Equity will also award damages which could not be recovered at law on an application for dower. At law, if the tenant dies after judgment, and before assessment of damages, the damages are lost to the widow; and if she herself dies before such assessment of damages, her personal representatives are without recourse. In these instances, the widow, or her personal representatives, by a resort to equity, obtain adequate relief.[6]

§ 1383. **Exclusive Jurisdiction over Dower in Equitable Estates.**— In England since the statute of 3 and 4 William IV.,[1] and in the United States from an early day, equity has assumed an exclusive jurisdiction over claims for dower in equitable estates.[2] Where the husband's estate was an equity of redemption, the widow may proceed against the mortgagee by a bill in equity to redeem.[3] Where the husband's estate was a portion of the assets of a partnership, and where the settlement of the partnership affairs has been unconscionably protracted, the widow may appeal to equity for relief.[4] If the husband should die seised of land on which a part of the purchase-money was due, the widow

§ 1382, [2] Dormer v. Fortescue, 3 Atk. 124, 130.

§ 1382, [3] Hill v. Gregory, 56 Miss. 341; Nye v. Patterson, 35 Mich. 413; Herbert v. Wren, 7 Cranch, 370.

§ 1382, [4] Swaine v. Perine, 5 Johns. Ch. 482; 9 Am. Dec. 318.

§ 1382, [5] Goodburn v. Stevens, 1 Md. Ch. 420.

§ 1382, [6] Curtis v. Curtis, 2 Brown Ch. 620, 632; Dormer v. Fortescue, 3 Atk. 124, 130; Mordant v. Thorold, 2 Lev. 275.

§ 1383, [1] Chapter 105.

§ 1383, [2] McMahan v. Kimball, 3 Blackf. 1.

§ 1383, [3] Dawson v. Bank of Whitehaven, L. R. 4 Ch. Div. 639; Anderson v. Pignet, L. R. 11 Eq. 329; Gibson v. Crehore, 3 Pick. 475; Farwell v. Cotting, 8 Allen, 211; Chiswell v. Morris, 14 N. J. Eq. 101; Eldridge v. Eldridge, 14 N. J. Eq. 195.

§ 1383, [4] Goodburn v. Stevens, 1 Md. Ch. 420.

may resort to equity for a sale of the land in satisfaction of the unpaid balance, and for her dower in the surplus.[5] On the conversion of the husband's estate into money, equity will award to the widow her proportionate share.[6] And where the husband has sought, by fraudulent conveyances, to defeat the wife's dower, equity will, on her application, grant appropriate relief.[7] The widow's right of dower, while yet unmeasured and unassigned, may be transferred by her, or reached by her judgment creditors, and her voluntary transferee, or the receiver appointed in aid of the judgment creditor, may maintain a suit in equity to have the dower assigned to him.[8] The assignment of dower is usually effected by a reference to a master and a commission, and the share is set out by metes and bounds. Where an account is needed, it may be taken by means of a similar reference. In many of our states summary proceedings have been provided by statute for the assignment of dower, especially where the widow's right thereto is not contested.

§ 1384. **Establishment of Disputed Boundaries.**— Where the boundaries between two adjacent parcels of land, even when held by their respective owners under purely legal

5 Danton v. Nanny, 8 Barb. 618; Thompson v. Cochran, 7 Humph. 72; 46 Am. Dec. 68; Daniel v. Leitch, 13 Gratt. 195.

6 In re Hall's Estate, L. R. 9 Eq. 179; Lawrence v. Miller, 1 Sand. 516; Higbie v. Westlake, 14 N. Y. 281.

7 Swaine v. Perine, 5 Johns. Ch. 482; 9 Am. Dec. 318; Holmes v. Holmes, 3 Paige, 363; Tate v. Tate, 1 Dev. & B. Eq. 22; Petty v. Petty, 4 B. Mon. 215; 39 Am. Dec. 501; London v. London, 1 Humph. 1; Smart v. Waterhouse, 10 Yerg. 94; Davis v. Davis, 5 Mo. 183. As to the defense of a *bona fide* purchase for value without notice, against the widow suing in equity for her dower, see *ante*, vol. 2, § 765; Joyce v. De Moleyns, 2 Jones & L. 374; Jerrard v. Saunders, 2 Ves. 254; Snelgrove v. Snelgrove, 4 Desaus. Eq. 274; Blain v. Harrison, 11 Ill. 384; Larrowe v. Beam, 10 Ohio, 498; Blake v. Heyward, Bail. Eq. 208; Campbell v. Murphy, 2 Jones Eq. 357; Ridgeway v. Newbold, 1 Harr. (Del.) 385; Jenkins v. Bodley, Smedes & M. Ch. 338; Wailes v. Cooper, 24 Miss. 208; Daniel v. Hollingshead, 16 Ga. 190.

8 Potter v. Everitt, 7 Ir. R. Eq. 152 (transferee); Payne v. Becker, 87 N. Y. 153 (receiver appointed in aid of an execution); Tompkins v. Fonda, 4 Paige, 448 (receiver); Stewart v. McMartin, 5 Barb. 438 (same); Strong v. Clem, 12 Ind. 37; 74 Am. Dec. 200 (transferee).

titles, have become confused or obscure, equity has, from an early period, exercised a jurisdiction to settle them.[1] Whether this jurisdiction originated in the consent of the parties, and proceeded by analogy to the writs *de rationalibus divisis* and *de perambulatione facienda* used at law,[2] or arose in avoidance of a multiplicity of suits,[3] has been discussed; but the determination of the question remains uncertain and conjectural. The mere fact, however, that certain boundaries are in controversy is not of itself sufficient to authorize the interference of equity; and upon such a showing, the parties would be left to their rights and remedies at law. Courts of equity will not interpose to ascertain boundaries, unless, in addition to a naked confusion of the controverted boundaries, there is suggested some peculiar equity, which has arisen from the conduct, situation, or relations of the parties.[4]

§ 1385. Equitable Incidents and Grounds.—The fraud or neglect of duty of the party against whom relief is sought by way of establishment of boundaries will afford a sufficient ground for equitable interference.[1] And where a settlement of the boundaries in dispute cannot be had at law without a multiplicity of suits, relief may be obtained

§ 1384, [1] Wake v. Conyers, 1 Eden, 331; 2 Lead. Cas. Eq., 4th Am. ed., 850, 853, 860; Mullineux v. Mullineux, Toth. 39; Peckering v. Kimpton, Toth. 39; Boteler v. Spelman, Finch, 96; Perry v. Pratt, 31 Conn. 433.

§ 1384, [2] Speer v. Crawter, 2 Mer. 410, 417.

§ 1384, [3] Wake v. Conyers, *supra.*

§ 1384, [4] Wake v. Conyers, *supra;* Miller v. Warmington, 1 Jacob & W. 484; Speer v. Crawter, 2 Mer. 410, 417; Atkins v. Hatton, 2 Anstr. 386; O'Hara v. Strange, 11 Ir. R. Eq. 262; Ireland v. Wilson, 1 Ir. R. Ch. 623; St. Lukes v. St. Leonards, cited 2 Anstr. 395; Perry v. Pratt, 31 Conn. 433; Wolcott v. Robbins, 26 Conn. 236; De Veney v. Gallagher, 20 N. J. Eq. 33; Norris's Appeal, 64 Pa. St. 275; Tillmes v. Marsh, 67 Pa. St. 507; Merriman v. Russell, 2 Jones Eq. 470; Hill v. Proctor, 10 W. Va. 59; Fraley v. Peters, 12 Bush, 469; Doggett v. Hart, 5 Fla. 215; 58 Am. Dec. 464; Wolf v. Scarborough, 2 Ohio St. 361; Hale v. Darter, 5 Humph. 79; Topp v. Williams, 7 Humph. 569; Wetherbee v. Dunn, 36 Cal. 249.

§ 1385, [1] Atkins v. Hatton, 2 Anstr. 386; Rous v. Barker, 4 Brown Parl. C. 660; Speer v. Crawter, 2 Mer. 410, 418; Duke of Leeds v. Earl of Strafford, 4 Ves. 180; Grierson v. Eyre, 9 Ves. 341, 345; Pratt v. Bryant, 20 Vt. 333; Perry v. Pratt, 31 Conn. 433; Fraley v. Peters, 12 Bush, 469.

in equity.[2] It may happen that such a relation exists between the parties as to make it incumbent upon one of them to preserve the boundaries. Such would be the case where one of the parties was a tenant or a copyholder; and in all such cases, equity will entertain the suit of the aggrieved party — as of a landlord — to compel the defendant — as in the example, a tenant — to preserve the boundaries from confusion.[3] In the case of a rent-charge, where, by reason of a confusion of the boundaries, the remedy of distress is defeated, a court of equity will issue a commission to fix the boundaries.[4] Where several parcels of land allotted to the holders of certain offices were for a number of years in the possession of a single occupant, who held all the offices, it would seem that a confusion of boundaries resulting from such holding would furnish a sufficient ground for the equitable relief.[5] It is necessary for the complainant to show that some portion of the lands, in respect of which the relief of establishing their boundaries is sought, is in the possession of the defendant.[6]

2 Wake v. Conyers, *supra;* Bouverie v. Prentice, 1 Brown Ch. 200; Marquis of Bute v. Glamorganshire Can. Co., 1 Phill. Ch. 681; Whaley v. Dawson, 2 Schoales & L. 367, 370; Commissioners etc. v. Glasse, 41 L. J. Ch. 409.

3 Aston v. Lord Exeter, 6 Ves. 288; Miller v. Warmington, 1 Jacob & W 484; Att'y-Gen. v. Fullerton, 2 Ves. & B. 263; Speer v. Crawter, 17 Ves. 216; Duke of Leeds v. Earl of Strafford, 4 Ves. 180; Godfrey v. Littel, 1 Russ. & M. 59; 2 Russ. & M. 630; Att'y-Gen. v. Stephens, 6 De Gex, M. & G. 111, 133; Clayton v. Cookes, 2 Atk. 449; Spike v. Harding, L. R. 7 Ch. Div. 871.

4 Bowman v. Yeat, cited 1 Ch. Cas. 145; Duke of Leeds v. Powell, 1 Ves. Sr. 171; North v. Earl of Strafford, 3 P. Wms. 148; Duke of Leeds v. Corp. of New Radnor, 2 Brown Ch. 338; Att'y-Gen. v. Stephens, 6 De Gex, M. & G. 111; Mayor etc. v. Lord Bolton, 1 Drew. 270, 289.

5 Kennedy v. Trott, 6 Moore P. C. C. 449, 467.

6 Att'y-Gen. v. Stephens, 6 De Gex, M. & G. 111; Godfrey v. Littel, 1 Russ. & M. 59; 2 Russ. & M. 630. As to the parties in suits to establish boundaries, all persons interested, whether their estates are present or future, remaindermen, and reversioners should be made parties, although, of course, all need not be joined as plaintiffs: 1 Daniell's Chancery Practice, 209; Rayley v. Best, 1 Russ. & M. 659; Miller v. Warmington, 1 Jacob & W. 484; Speer v. Crawter, 2 Mer. 410; Att'y-Gen. v. Stephens, *supra;* Pope v. Melone, 2 A. K. Marsh. 239.

§ 1386. **Partition of Lands — Common-law Remedy.**— At common law, the writ of partition lay only in case of lands held in coparcenary.[1] The remedy was afterwards extended by statute to joint tenancies and tenancies in common.[2] Where the tenure was copyhold, partition might be had in the lord's court by a plaint in the nature of a writ of partition. As the plaint and the writ have both been abolished by statute,[3] this jurisdiction of equity is now, in the absence of statutory provision, exclusive. The operation of the common-law remedy, even after its extension to joint tenancies and tenancies in common, was imperfect and narrow. The writ of partition lay only against the tenant in possession, and was incompetent to reach the remainderman or the reversioner. As the judgment at law proceeded according to the titles proved, it was necessary for the plaintiff to show the title of the defendant as well as his own. And as partition at law was made by the sheriff by actual division, it might happen that, where the undivided interests were incapable of exact apportionment, the judgment of the court would be powerless to compensate the inequalities.

§ 1387. **Equitable Jurisdiction and Remedies.**— These difficulties, illustrating the inadequacy of the legal remedy, gave rise to the equitable interference. As early as the reign of Elizabeth, partition became a matter of equitable cognizance;[1] and now the jurisdiction is established as of right in England and in the United States.[2] The remedy

§ 1386, [1] The reason given was, that as tenancy in coparcenary arose by operation of law, it was only proper that the law should afford the means of severance.

§ 1386, [2] 31 Henry VIII., c. 1; 32 Henry VIII., c. 32.

§ 1386, [3] 3 & 4 Wm. IV., c. 27.

§ 1387, [1] 1 Fonblanque's Equity, b. 1, c. 1, sec. 3, note *f;* Speke v. Walrond, Toth. 155.

§ 1387, [2] Agar v. Fairfax, 17 Ves. 533; 2 Lead. Cas. Eq., 4th Am. ed., 865, 880, 894; Baring v. Nash, 1 Ves. & B. 551; Parker v. Gerard, Amb. 236; Wood v. Little, 35 Me. 107; Bailey v. Sisson, 1 R. I. 233; Donnell v. Mateer, 7 Ired. Eq. 94; Holmes v. Holmes, 2 Jones Eq. 334; Howey v. Goings, 13 Ill. 95; 54 Am. Dec. 427. And see Wotten v. Copeland, 7 Johns. Ch. 140; Sebring v. Mersereau, Hopk. Ch. 501; 9 Cow. 344; Harwood v. Kirby, 1 Paige, 469; Teal v. Woodworth, 3 Paige, 470; Wilkinson v. Parish,

in equity is not confined to the tenants in possession, but extends to all persons interested, whether presently or in expectancy; and remaindermen, reversioners, infants, and persons not *in esse* may be bound by the decree.[3]

§ 1388. The Title of the Plaintiff.— The difficulty under which the complainant labored at law in proving the title

3 Paige, 653; Burhans v. Burhans, 2 Barb. Ch. 398; Van Arsdale v. Drake, 2 Barb. 599; Green v. Putnam, 1 Barb. 500; Tanner v. Niles, 1 Barb. 560; Scott v. Guernsey, 60 Barb. 163; 48 N. Y. 106; Mead v. Mitchell, 17 N. Y. 210; 72 Am. Dec. 455; Clemens v. Clemens, 37 N. Y. 59; Gregory v. Gregory, 69 N. C. 522; Tabler v. Wiseman, 2 Ohio St. 207; Williams v. Van Tuyl, 2 Ohio St. 336; Gregory v. High, 29 Ind. 527; Milligan v. Poole, 35 Ind. 64; Larned v. Renshaw, 37 Mo. 458; Waugh v. Blumenthal, 28 Mo. 462; Reinhardt v. Wendeck, 40 Mo. 577; De Uprey v. De Uprey, 27 Cal. 329; 87 Am. Dec. 81; Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139.

3 Lord Brook v. Lord Hertford, 2 P. Wms. 518; Gaskell v. Gaskell, 6 Sim. 643; Hobson v. Sherwood, 4 Beav. 184; Wills v. Slade, 6 Ves. 498. But while all persons interested in the land, whether in possession or in expectancy, are proper parties to a bill in partition, only those in possession are entitled to file the bill: Evans v. Bagshaw, L. R. 8 Eq. 469; L. R. 5 Ch. 340; Agar v. Fairfax, 2 Lead. Cas. Eq. 880, 894. The mortgagors of undivided interests may have partition of the equity of redemption: Wotten v. Copeland, 7 Johns. Ch. 140. But the mortgagees and judgment creditors of tenants in common are not proper, or at least not necessary, parties to a bill of partition: Sebring v. Mersereau, 9 Cow. 344; Harwood v. Kirby, 1 Paige, 469; Low v. Holmes, 17 N. J. Eq. 148; Speer v. Speer, 14 N. J. Eq. 240; Thruston v. Minke, 32 Md. 571. Where a mortgagee's interests require that he should be joined, he may be made a party: Whitton v. Whitton, 38 N. H. 127, 135; 75 Am. Dec. 163. It has been held that the mortgagee of an undivided share may sue in equity for a foreclosure and partition, and obtain a receiver of the rents and profits issuing out of the share of the mortgagor: Fall v. Elkins, 9 Week. Rep. 861. In general, all the tenants in common or joint tenants should be made parties; but all need not be plaintiffs: Anonymous, 3 Swanst. 139, note; Cornish v. Gest, 2 Cox, 27; Brashear v. Macey, 3 J. J. Marsh. 89; Braker v. Devereaux, 8 Paige, 513; Borah v. Archers, 7 Dana, 176; Rosekrans v. White, 7 Lans. 486 (wife of tenant); Scott v. Guernsey, 60 Barb. 163, 181 (administrator of deceased tenant); Sullivan v. Sullivan, 4 Hun, 198. Suit by a lessee of a share without making his lessor a party: Baring v. Nash, 1 Ves. & B. 551; Heaton v. Dearden, 16 Beav. 147. As to how far a decree between tenants for life will bind future contingent interests, see Wotten v. Copeland, 7 Johns. Ch. 140; Mead v. Mitchell, 17 N. Y. 210, 214; 72 Am. Dec. 455; Clemens v. Clemens, 37 N. Y. 59; Striker v. Mott, 2 Paige, 387, 389; 22 Am. Dec. 646; Woodworth v. Campbell, 5 Paige, 518; Gaskell v. Gaskell, 6 Sim. 643. See Pomeroy on Remedies, sec. 254. With reference to parties defendant, and especially the legislation of various states on that subject, see Pomeroy on Remedies, secs. 373–377.

as well of the defendant as of himself is, in equity, obviated by a discovery, and if need be by a reference to the master. The complainant must show title in himself, and such a title as will establish his right, as against the defendant, to a partition.[1] Where the complainant's legal title is disputed, courts of equity decline the jurisdiction to try this question; but, in analogy to the case of dower, they will retain the bill for a reasonable time, until the issue of title has been determined at law.[2] If the disputed titles are equitable, courts of equity will exercise jurisdiction to settle them, and will then grant final relief by way of partition, under the same bill.[3] Where the subject-matter of the suit is an equitable estate[4] or an incorporeal hereditament,[5] a partition may be had in equity.

§ 1389. **Mode of Partition — Pecuniary Compensation.**— In the original jurisdiction of equity the partition was effected by means of mutual conveyances; and where the land was incapable of exact or fair division, the court had power to compensate for the inequality by awarding what was known as "owelty of partition," being a pecuniary compensation, or a charge upon the land by way of rent, servitude, or easement.[1] And if one of the joint owners or

§ 1388, [1] Agar v. Fairfax, *supra;* Jope v. Morshead, 6 Beav. 213; Parker v. Gerard, Amb. 236.

§ 1388, [2] Slade v. Barlow, L. R. 7 Eq. 296; Giffard v. Williams, L. R. 5 Ch. 546; Bolton v. Bolton, L. R. 7 Eq. 298, note; Potter v. Waller, 2 De Gex & S. 410; Simpson v. Wallace, 83 N. C. 477; Mattair v. Payne, 15 Fla. 682; Hardy v. Mills, 35 Wis. 141; Hoffman v. Beard, 22 Mich. 59; Wilkin v. Wilkin, 1 Johns. Ch. 111, 118; Manners v. Manners, 2 N. J. Eq. 384; 35 Am. Dec. 512; Currin v. Spraull, 10 Gratt. 145.

§ 1388, [3] Crosier v. McLaughlin, 1 Nev. 348; Leverton v. Waters, 7 Cold. 20; Ross v. Cobb, 48 Ill. 111; Foust v. Moorman, 2 Ind. 17; Donnell v. Mateer, 7 Ired. Eq. 94; Carter v. Taylor, 3 Head, 30; Obert v. Obert, 10 N. J. Eq. 98; Longwell v. Bentley, 23 Pa. St. 99.

§ 1388, [4] Hitchcock v. Skinner, Hoff. Ch. 21; Crosier v. McLaughlin, 1 Nev. 348.

§ 1388, [5] Bailey v. Sisson, 1 R. I. 233.

§ 1389, [1] Earl of Clarendon v. Hornby, 1 P. Wms. 446; Turner v. Morgan, 8 Ves. 143; Story v. Johnson, 2 Younge & C. 586; Horncastle v. Charlesworth, 11 Sim. 315; Mole v. Mansfield, 15 Sim. 41; Smith v. Smith, 10 Paige, 470; Larkin v. Mann, 2 Paige, 27; Phelps v. Green, 3 Johns. Ch. 302; Haywood v. Judson, 4 Barb. 228; Norwood v. Norwood, 4 Har. & J. 112; Warfield v

owners in common has received more than his share of the rents and profits, the court will direct an account for the purpose of decreeing a reimbursement.[2] And if it should appear that one of the parties had made improvements on the land of which partition is sought, he will be awarded suitable compensation.[3] The inconvenience or difficulty attending the partition is no ground for refusing the relief.[4]

§ 1390. **Partition by Means of a Sale.**— On account of the difficulty of making an equable apportionment and division of the land, it might sometimes be expedient for the court to order a sale of the property and a division of the proceeds. By the original equitable jurisdiction, independent of any statute, if all the parties *sui juris* were willing, the court had power to decree a sale; and this, even though infants might be among the parties interested.[1] But where one of the parties *sui juris* refused his consent, the court had no option but to proceed with the ordinary mode of partition.[2] This restriction has in England been removed

Warfield, 5 Har. & J. 459; Cox v. McMullin, 14 Gratt. 82; Wynne v. Tunstall, 1 Dev. Eq. 23; Graydon v. Graydon, McMull. Eq. 63; Oliver v. Jernigan, 46 Ala. 41.

§ 1389, [2] Lorimer v. Lorimer, 5 Madd. 363; Hill v. Fulbrook, Jac. 574; Story v. Johnson, 2 Younge & C. 586; Leach v. Beattie, 33 Vt. 195; Hitchcock v. Skinner, Hoff. Ch. 21; Early v. Friend, 16 Gratt. 21; 78 Am. Dec. 649; Carter's Ex'r v. Carter, 5 Munf. 108; Backler v. Farrow, 2 Hill Ch. 111; Rozier v. Griffith, 31 Mo. 171.

§ 1389, [3] Swan v. Swan, 8 Price, 518; Green v. Putnam, 1 Barb. 500; Conklin v. Conklin, 3 Sand. Ch. 64; St. Felix v. Rankin, 3 Edw. Ch. 323; Brookfield v. Williams, 2 N. J. Eq. 341; Obert v. Obert, 5 N. J. Eq. 397; Sneed's Heirs v. Atherton, 6 Dana, 276; 32 Am. Dec. 70; Borah v. Archers, 7 Dana, 176; Respass v. Breckenridge's Heirs, 2 A. K. Marsh. 581; Dean v. O'Meara, 47 Ill. 120; Martindale v. Alexander, 26 Ind. 104; 87 Am. Dec. 458.

§ 1389, [4] Warner v. Baynes, Amb. 589; Parker v. Gerard, Amb. 236. In one case the doctrine was carried to the extent of making partition of a house by building a wall through the middle of it: Turner v. Morgan, 8 Ves. 143. Where the defendants, however, objected to the division of their own shares, the partition would be confined to the setting out and severing the share of the complainant: Hobson v. Sherwood, 4 Beav. 184.

§ 1390, [1] Davis v. Turvey, 32 Beav. 554; Hubbard v. Hubbard, 2 Hem. & M. 38; Thackeray v. Parker, 1 N. R. 567.

§ 1390, [2] Griffies v. Griffies, 11 Week. Rep. 943; Wood v. Little, 35 Me. 107; Codman v. Tinkham, 15 Pick. 364.

by a modern statute.[3] In the United States an unqualified power of sale has been conferred on the courts in very many of the states, the power to be exercised whenever it shall appear to the court, independently of the consent of the parties, that a sale would be more beneficial, or less injurious, than an actual division.[4] As between a sale and a partition, however, the courts will *favor* a partition, as not disturbing the existing form of the inheritance.[5]

§ 1391. Partition of Personal Property — Equitable Jurisdiction and Remedy.— The rules and proceedings which obtained at common law and by statute on the subject of partition related exclusively to real estate.[1] At common law the co-owner of a chattel could maintain an action respecting the common property against his co-tenant only where a loss, destruction, or sale of the property was provable against the defendant.[2] However expedient the partition of chattels might appear, or however desirable it might be to the co-tenants, the common law furnished no instrumentality by which the partition could be judicially effected. There was not merely an inadequacy of legal remedy, there was an utter absence of it. The situation clearly demanded the intervention of equity. And although the inception of the equitable jurisdiction for the partition of chattels is not traceable with certainty, the jurisdiction itself is unquestioned; and where a literal partition is not practicable, the court will order a sale.[3]

§ 1390, [3] 31 & 32 Vict., c. 40.

§ 1390, [4] Thompson v. Hardman, 6 Johns. Ch. 436; McCall's Appeal, 56 Pa. St. 363; Matter of Skinner's Heirs, 2 Dev. & B. Eq. 63; Steedman v. Weeks, 2 Strob. Eq. 145; 49 Am. Dec. 660; Royston v. Royston, 13 Ga. 425; Wilson v. Duncan, 44 Miss. 642; Higginbottom v. Short, 25 Miss. 160; 57 Am. Dec. 198; Graham v. Graham, 8 Bush, 334; Welsh v. Freeman, 21 Ohio St. 402.

§ 1390, [5] Davidson v. Thompson, 22 N. J. Eq. 83; Thruston v. Minke, 32 Md. 571; Graham v. Graham, 8 Bush, 334.

§ 1391, [1] Allnatt on Partition, 48.

§ 1391, [2] Gilbert v. Dickerson, 7 Wend. 449; 22 Am. Dec. 592; Tinney v. Stebbins, 28 Barb. 290; Cowles v. Garrett's Adm'rs, 30 Ala. 341; Hinds v. Terry, Walk. (Miss.) 80.

§ 1391, [3] Tripp v. Riley, 15 Barb. 333; Fobes v. Shattuck, 22 Barb. 568; Tinney v. Stebbins, 28 Barb. 290; Wetmore v. Zabriskie, 29 N. J. Eq. 62;

§ 1392. **The Issue of Title.**— In the partition of real estate, the rule was well settled, that where the title of the complainant was put in issue, a court of equity would suspend its interference until the question of title had been determined at law in an action of ejectment. But no ejectment lay to try the title to personalty. A refusal, then, by a court of equity, in proceedings for the partition of chattels, to pass upon an issue of title would be tantamount to a complete failure of justice. Courts of equity, therefore, when partition of personalty is sought, have of necessity departed from the analogies of the law of real estate, and have assumed jurisdiction to determine as well the issue of title as any other issue pertinent to the case.[1]

Crapster v. Griffith, 2 Bland, 525; Smith v. Smith, 4 Rand. 95, 102; Kerley v. Clay, 4 Bibb, 241; Marshall v. Crow's Adm'r, 29 Ala. 278; Conover v. Earl, 26 Iowa, 167.

[1] Weeks v. Weeks, 5 Ired. Eq. 111; 47 Am. Dec. 358; Edwards v. Bennett, 10 Ired. 363; Smith v. Dunn, 27 Ala. 315.

CHAPTER SECOND.

SUITS BY WHICH SOME GENERAL RIGHT, EITHER LEGAL OR EQUITABLE, IS ESTABLISHED — BILLS OF PEACE AND BILLS QUIA TIMET QUIETING TITLE.

ANALYSIS.

§ 1393. Nature and object.
§ 1394. Bills of peace — Bills *quia timet* — Quieting title.

§ 1393. Nature and Object.— In all the remedies belonging to this class, some *general* right, which may be either legal or equitable, is declared and established.[1] The class includes suits to establish a will, suits to construe a will, and the bills of peace and bills *quia timet* for the purpose of quieting title, which belong to the original general jurisdiction of equity.[2]

§ 1394. Bills of Peace — Quieting Title.— The origin, grounds, growth, and extent of the jurisdiction of equity to entertain bills of peace have been fully discussed in the section which treats of the jurisdiction to prevent a multiplicity of suits.[1] It was shown that there were two

§ 1393, [1] Some of the remedies of this class undoubtedly depend upon what the early chancellors called the "jurisdiction *quia timet*." Since the conception of a *quia timet* jurisdiction is so broad, and runs through so many different branches of the remedial jurisprudence, I have not adopted it as a basis of classification. The object of suits to establish and to construe wills is plainly the establishment of a general right; and the same is no less true of those suits to quiet title, bills of peace, and the like, which belong to the original jurisdiction of equity.

§ 1393, [2] All of these remedies have been fully considered in the preceding parts of this work, and I shall only add here a few observations concerning bills of peace, etc.

For suits to establish a will, see *ante*, § 1158. For suits to construe a will, see *ante*, §§ 1155–1157; also see Dill v. Wisner, 88 N. Y. 153; Delaney v. McCormack, 88 N. Y. 174; Bliven v. Seymour, 88 N. Y. 469 (will of personal property). For suit quieting title, bills of peace, etc., see *ante*, vol. 1, §§ 243–275.

§ 1394, [1] Vol. 1, p. 254, sec. iv

distinct kinds of bills of peace,— the one brought for the purpose of establishing a general right between a single party and numerous persons claiming distinct and individual interests, and the other for the purpose of quieting a complainant's title to land against a single adverse claimant.[2] In the first class, the original jurisdiction to maintain " bills of peace " or " bills *quia timet,*" properly so called, will only be exercised where the claims of the numerous individuals have some community of interest in the subject-matter, or arise from a common title; but the jurisdiction has been enlarged so as to entertain analogous suits, where the community of interest is in respect merely to the questions involved or to the kind of relief demanded.[3] In the second class, the suit can be maintained by a party in possession against a single defendant ineffectually seeking to establish a legal title by repeated actions of ejectment. It is here necessary that the title of the complainant should be established by at least one successful trial at law before equity will entertain jurisdiction.[4]

[2] Vol. 1, § 246.

[3] See the cases cited in vol. 1, §§ 273, 274, and the following additional cases on the last branch of the statement: Thorpe v. Brumfitt, L. R. 8 Ch. 650, 655, 656; White v. Jameson, L. R. 18 Eq. 303; Duke of Buccleuch v. Cowan, 5 Macph. (5 Ses. Cas. S., 3d series) 214; Chipman v. Palmer, 77 N. Y. 51, 56; 33 Am. Rep. 566; Chenango Bridge Co. v. Lewis, 63 Barb. 111; Henshaw v. Clark, 14 Cal. 460, 465; Hillman v. Newington, 57 Cal. 56, 64; Blaisdell v. Stephens, 14 Nev. 17, 23; 33 Am. Rep. 523; Gaines v. Chew, 2 How. 619, 642; Oliver v. Piatt, 3 How. 333, 412; Central Pac. R. R. v. Dyer, 1 Saw. 641, 650; Woodruff v. North Bloomfield etc. Co., 8 Saw. 628, 636; Troy & B. R. R. v. Boston etc. R'y, 86 N. Y. 107; Town of Springport v. Teutonia Sav. Bank, 75 N. Y. 397.

[4] Vol. 1, §§ 253, 272; Thompson v. Engle, 4 N. J. Eq. 271; Gunn v. Harrison, 7 Ala. 585. This class is practically obsolete in many states, owing to the effect given to judgments, by statute, in the action of ejectment.

CHAPTER THIRD.

SUITS BY WHICH SOME PARTICULAR ESTATE, INTEREST, OR RIGHT, EITHER LEGAL OR EQUITABLE, IS ESTABLISHED — STATUTORY SUIT TO QUIET TITLE — SUIT TO REMOVE A CLOUD FROM TITLE.

ANALYSIS.

§ 1395. Nature and object.
§ 1396. Statutory suit to quiet title; legislation.
§ 1397. The same; essential features and requisites; possession; title.
§ 1398. Suit to remove a cloud from title; to prevent a cloud.
§ 1399. The same; when the jurisdiction is exercised; general doctrine.

§ 1395. **Nature and Object.**— In all the instances of this class, as distinguished from those of the preceding one, the direct object of the remedy is to declare and establish some particular estate, interest, or right, either legal or equitable, in the property which is the subject-matter.[1] The class as a whole embraces suits for the strict foreclosure of a mortgage or a pledge, suits for the redemption of a mortgage, suits for the redemption of a pledge,[2] statutory suits to quiet title, and suits to remove a cloud from title.

§ 1396. **Statutory Suit to Quiet Title — Legislation.**— The equity jurisdiction to quiet title, independent of statute, was only invoked by a plaintiff in possession, holding the legal title, when successive actions at law, all of which had failed, were brought against him by a single person out

1 Some of these remedies, also, have been said to depend upon the *quia timet* jurisdiction.

2 These three remedies have already been considered: Strict foreclosure of a mortgage: *Ante*, § 1227; of a pledge: *ante*, § 1231. Redemption of a mortgage: *Ante*, §§ 1219, 1220; of a pledge: *ante*, § 1231. I shall in this chapter only discuss the statutory suit to quiet title, and the suit to remove a cloud from title. The former of these suits has, in many of the states, become the most important and common of equitable remedies, and has even taken the place, to some extent, of the action of ejectment. The original equitable jurisdiction to quiet title has been greatly enlarged.

of possession, or when many persons asserted equitable titles against a plaintiff in possession holding the legal or an equitable title. The action has been greatly extended by statute, and in many states is the ordinary mode of trying disputed titles.[1] The states adopting such statutes

[1] *Arizona:* Code Civ. Proc., sec. 256; *California:* Code Civ. Proc., sec. 738; Practice Act, sec. 254; *Colorado:* Code Civ. Proc., sec. 237; *Dakota:* Rev. Codes 1877, p. 584, sec. 635; *Idaho:* Rev. Laws 1874–75, p. 146, sec. 275; *Illinois:* Hurd's Rev. Stats. 1880, p. 192, c. 22, sec. 50; *Indiana:* 2 Davis's Stats. 1876, p. 254, sec. 611; *Iowa:* 1 Miller's Rev. Code 1880, p. 802, sec. 3273; *Kansas:* Dassler's Comp. Laws 1881, p. 683, sec. 594; *Kentucky:* 2 Stanton's Rev. Stats. 1867, c. 57, p. 102; *Michigan:* 2 Comp. Laws 1871, p. 1537, sec. 36; *Minnesota:* Young's Stats. 1880, p. 814, c. 75, sec. 2; *Mississippi:* Rev. Code 1880, p. 507, sec. 1833; *Montana:* Rev. Stats. 1879, p. 110, sec. 354; *Nebraska:* Brown's Comp. Stats. 1881, p. 394, c. 73, sec. 57; *Nevada:* 1 Comp. Laws 1873, p. 372, sec. 1317; *New Jersey:* Rev. 1877, p. 1189; *New York:* 2 Bliss's Code Civ. Proc. 1880, p. 88, sec. 1638; *Ohio:* Code Civ. Proc., sec. 557; Rev. Stats. 1880, p. 1396, sec. 5779; *Oregon:* Gen. Laws 1874, p. 212, sec. 500; *Utah:* Comp. Laws 1876, p. 477, sec. 254; *Wisconsin:* Taylor's Rev. Stats. 1872, p. 1671, c. 141, sec. 29. See also *Georgia:* Code 1882, secs. 3232, 3233; and *Louisiana:* Voorhies's Rev. Code of Prac. 1875, p. 46, arts. 46, 49, 50, 52. The statutes of Massachusetts and Missouri contain provisions concerning preliminary actions which may be brought against holders of adverse claims, to show cause why such holders should not institute proceedings to have their claims determined: See Mass. Pub. Stats. 1882, p. 1026, c. 176; Mo. Rev. Stats. 1879, p. 608, sec. 3562. The action, if brought by a plaintiff in possession, or perhaps when both parties are out of possession, is held to be equitable in its nature: Leggett v. Cole, 1 McCrary, 515; Balmear v. Otis, 4 Dill. 558; Brandt v. Wheaton, 52 Cal. 430.

The following are decisions arising under these various acts: —

California: Present code: Leet v. Rider, 48 Cal. 623; Pierce v. Felter, 53 Cal. 18; Stoddart v. Burge, 53 Cal. 394; Brandt v. Wheaton, 52 Cal. 430; San Francisco v. Ellis, 54 Cal. 72; Brewer v. Houston, 58 Cal. 345; Burton v. Le Roy, 5 Saw. 510. Practice Act: Merced Min. Co. v. Fremont, 7 Cal. 317; 68 Am. Dec. 262; Smith v. Brannan, 13 Cal. 107; Curtis v. Sutter, 15 Cal. 259; Van Winkle v. Hinckle, 21 Cal. 342; Rico v. Spence, 21 Cal. 504; Head v. Fordyce, 17 Cal. 149; Lyle v. Rollins, 25 Cal. 437; Horn v. Jones, 28 Cal. 194; Ferris v. Irving, 28 Cal. 645; Reed v. Calderwood, 32 Cal. 109; Pralus v. Pacific etc. Min. Co., 35 Cal. 30; Pralus v. Jefferson etc. M. Co., 34 Cal. 558; Brooks v. Calderwood, 34 Cal. 563; 45 Cal. 519; Ross v. Heintzen, 36 Cal. 313; Nevada Co. etc. Canal Co. v. Kidd, 37 Cal. 282; Sepulveda v. Sepulveda, 39 Cal. 13; Coleman v. San Rafael etc. Co., 49 Cal. 517.

Illinois: Emery v. Cochran, 82 Ill. 65; Hardin v. Jones, 86 Ill. 313; Gage v. Abbott, 99 Ill. 366; Whitney v. Stevens, 97 Ill. 482; Oakley v. Hurlbut, 100 Ill. 204; Barnard v. Hoyt, 63 Ill. 341; Wing v. Sherrer, 77 Ill. 200.

Indiana: Cooper v. Jackson, 71 Ind. 244; Green v. Glynn, 71 Ind. 336; Rose v. Nees, 61 Ind. 484.

may be separated into two classes, the first and most numerous class requiring the plaintiff to be in possession, and the second allowing the action to be brought by a

Iowa: Fejervary v. Langer, 9 Iowa, 159; Laverty v. Sexton, 41 Iowa, 435; Miller v. Davison, 31 Iowa, 435; Lewis v. Soule, 52 Iowa, 11; Paton v. Lancaster, 38 Iowa, 494; Balmear v. Otis, 4 Dill. 558.

Kansas: Eaton v. Giles, 5 Kan. 24; Brenner v. Bigelow, 8 Kan. 496; O'Brien v. Creitz, 10 Kan. 202; Wood v. Missouri etc. R'y, 11 Kan. 323; Giles v. Ortman, 11 Kan. 59; Douglass v. Nuzum, 16 Kan. 515; Entreken v. Howard, 16 Kan. 551; Cartwright v. McFadden, 24 Kan. 662; Douglass v. Bishop, 24 Kan. 749; Giltenan v. Lemert, 13 Kan. 476; Pierce v. Thompson, 26 Kan. 714.

Kentucky: Dudley v. Trustees of Frankfort, 12 B. Mon. 610; Armitage v. Wickliffe, 12 B. Mon. 488, 494; Taylor v. Embry, 16 B. Mon. 340; Cates v. Loftus's Heirs, 4 T. B. Mon. 439; Beard v. Smith, 6 T. B. Mon. 430, 505; Underwood v. Crutcher, 7 J. J. Marsh. 529; Hiatt's Heirs v. Calloway's Heirs, 7 B. Mon. 178; Harris v. Smith, 2 Dana, 10; Landrum v. Farmer, 7 Bush, 46; Fraley v. Peters, 12 Bush, 469.

Michigan: Stockton v. Williams, 1 Doug. (Mich.) 546; Hall v. Kellogg, 16 Mich. 135; Rowland v. Doty, Harr. (Mich.) 3; Blanchard v. Tyler, 12 Mich. 339; 86 Am. Dec. 57; Stetson v. Cook, 39 Mich. 750; Haddon v. Hemingway, 39 Mich. 615; Hammontree v. Lott, 40 Mich. 190; Barron v. Robbins, 22 Mich. 35; King v. Carpenter, 37 Mich. 363; Moran v. Palmer, 13 Mich. 367; Ormsby v. Barr, 22 Mich. 80; Jenkins v. Bacon, 30 Mich. 154; Meth. Church of Newark v. Clark, 41 Mich. 730.

Minnesota: Steele v. Fish, 2 Minn. 153; Meighen v. Strong, 6 Minn. 177; 80 Am. Dec. 441; Bidwell v. Webb, 10 Minn. 59; 88 Am. Dec. 56; Wilder v. City of St. Paul, 12 Minn. 192; Murphy v. Hinds, 15 Minn. 182; Byrne v. Hinds, 16 Minn. 521; Conklin v. Hinds, 16 Minn. 457; Leggett v. Cole, 1 McCrary, 515.

Mississippi: Boyd v. Thornton, 13 Smedes & M. 338; Toulmin v. Heidelberg, 32 Miss. 268; Kerr v. Freeman, 33 Miss. 292; Ezelle v. Parker, 41 Miss. 520; Huntington v. Allen, 44 Miss. 654; Glazier v. Bailey, 47 Miss. 395; Carlisle v. Tindall, 49 Miss. 229; Handy v. Noonan, 51 Miss. 166; Griffin v. Harrison, 52 Miss. 824; Shivers v. Simmons, 54 Miss. 520; 28 Am. Rep. 372; Wofford v. Bailey, 57 Miss. 239.

Nebraska: State v. Sioux City etc. R. R., 7 Neb. 357; Harral v. Gray, 10 Neb. 186.

Nevada: Low v. Staples, 2 Nev. 209; Scorpion S. M. Co. v. Marsano, 10 Nev. 370; Lake Bigler Road Co. v. Bedford, 3 Nev. 399; Central Pac. R. R. v. Dyer, 1 Saw. 641.

New Jersey: Powell v. Mayo, 24 N. J. Eq. 178; Holmes v. Chester, 26 N. J. Eq. 79; Bogert v. City of Elizabeth, 27 N. J. Eq. 568; Jersey City v. Lembeck, 31 N. J. Eq. 255; Ludington v. City of Elizabeth, 32 N. J. Eq. 159; 34 N. J. Eq. 357; Lembeck v. Jersey City, 30 N. J. Eq. 554; Raymond v. Post, 25 N. J. Eq. 447.

New York: Onderdonk v. Mott, 34 Barb. 106; Haynes v. Onderdonk, 5

plaintiff either in or out of possession.[2] In almost every instance the statutes, either by express terms or through broad and general language, allow the action to be main-

Thomp. & C. 176; Burnham v. Onderdonk, 41 N. Y. 425; Fisher v. Hepburn, 48 N. Y. 41; Austin v. Goodrich, 49 N. Y. 266; Barnard v. Simms, 42 Barb. 304; Donahue v. O'Conor, 13 Jones & S. 278; Schroeder v. Gurney, 10 Hun, 413; Ford v. Belmont, 69 N. Y. 567.

Ohio: Harvey v. Jones, 1 Disn. 65; Douglass v. Scott, 5 Ohio, 194; Clark v. Hubbard, 8 Ohio, 382; Thomas v. White, 2 Ohio St. 540; Ellithorpe v. Buck, 17 Ohio St. 72; Collins v. Collins, 19 Ohio St. 468; Rhea v. Dick, 34 Ohio St. 420; Bailey v. Hughes, 35 Ohio St. 597.

Oregon: Tichenor v. Knapp, 6 Or. 205; Thompson v. Woolf, 8 Or. 454; King v. French, 2 Saw. 441; Stark v. Starrs, 6 Wall. 402.

Utah: Goldberg v. Taylor, 2 Utah, 486.

Wisconsin: Pier v. Fond du Lac, 38 Wis. 470; Maxon v. Ayers, 28 Wis. 612; Shaffer v. Whelpley, 37 Wis. 334; Page v. Kennan, 38 Wis. 320; Wals v. Grosvenor, 31 Wis. 681; Jones v. Collins, 16 Wis. 594; Gamble v. Loop, 14 Wis. 465; Dean v. Madison, 9 Wis. 402.

Georgia: South Carolina R. R. v. Steiner, 44 Ga. 546; Jones v. Georgia R. R., 62 Ga. 718; Dart v. Orme, 41 Ga. 376; Wynne v. Lumpkin, 35 Ga. 208.

Louisiana: Dooley v. Gibson, 32 La. Ann. 192; Lange v. Baranco, 32 La. Ann. 697; White v. Sheriff, 32 La. Ann. 130; Dahlgreen v. Duncan, 26 La. Ann. 363; Deuchatell v. Robinson, 24 La. Ann. 176; Dickson v. Marks, 10 La. Ann. 518; Searles v. Costillo, 12 La. Ann. 203; Millard v. Richard, 13 La. Ann. 572.

Massachusetts: Hill v. Andrews, 12 Cush. 185; Dewey v. Bulkley, 1 Gray, 416; Macomber v. Jaffray, 4 Gray, 82; Munroe v. Ward, 4 Allen, 150; Tompkins v. Wyman, 116 Mass. 558; India Wharf v. Central Wharf, 117 Mass. 504; Tisdale v. Brabrook, 102 Mass. 374; Boston Mfg. Co. v. Burgin, 114 Mass. 340; Bowditch v. Gardner, 113 Mass. 315.

Missouri: Von Phul v. Penn, 31 Mo. 333; Rutherford v. Ullman, 42 Mo. 216; Deware v. Wyatt, 50 Mo. 236; Jordon v. Stevens, 55 Mo. 361; Webb v. Donaldson, 60 Mo. 394; Babe v. Phelps, 65 Mo. 27; Grant v. King, 31 Mo. 312; Campbell v. Allen, 61 Mo. 581; Bredell v. Alexander, 8 Mo. App. 110.

[2] The states and territories comprising the first class are Arizona, California (under the former Practice Act), Colorado, Kansas, Kentucky, Illinois (except where the land is unimproved and unoccupied), Michigan, Minnesota (except in the case of vacant and unoccupied land), Montana, Nevada, New Jersey, New York, Ohio, Oregon, Utah, and Wisconsin. The complaint must allege possession, the allegation is material, and if traversed, must be proved, or the plaintiff's case will fail: Ferris v. Irving, 28 Cal. 645, 647; Pralus v. Jefferson etc. Min. Co., 34 Cal. 558; Sepulveda v. Sepulveda, 39 Cal. 13, 18; Meighen v. Strong, 6 Minn. 177; 80 Am. Dec. 441; Douglass v. Nuzum, 16 Kan. 515; Shaffer v. Whelpley, 37 Wis. 334. In regard to the nature of the possession requisite to maintain the action, there is some conflict. It has been held on the one side that possession must be lawful, — must be accompanied by a claim of right, legal or equitable: Stark v. Starrs, 6 Wall. 402; King v. French, 2 Saw. 441; Tichenor v. Knapp, 6 Or. 205; and on the

tained by persons having equitable titles; in other words, a plaintiff need not have a legal title.[3]

§ 1397. **Essential Features and Requisites.**— The essential features of the action brought in states of the first class, wherein it differs from the ordinary equitable suit to quiet title, are that the plaintiff may in all cases take the initiative, and need not wait for proceedings to be instituted against him; the statute is an enabling act; and the action may be brought against one or more claimants without regard to the interest or title — legal or equitable — which he or the plaintiff may hold.[1] In addition to the fore-

other, that it is immaterial how possession was obtained, — by collusion, fraud, or otherwise: Scorpion S. M. Co. v. Marsano, 10 Nev. 370; Calderwood v. Brooks, 45 Cal. 519. The states and territories included in the second class are California, Dakota, Idaho, Indiana, Iowa, Mississippi, and Nebraska.

[3] The excepted instances are Kentucky, Wisconsin, and formerly Ohio: See Chase's Ohio Stats. 687, 1278, 1697. In these states a plaintiff is required to have a legal title.

[1] See the various statutes; Curtis v. Sutter, 15 Cal. 259, 263; Head v. Fordyce, 17 Cal. 149; Central Pac. R. R. v. Dyer, 1 Saw. 641, 648; Stark v. Starrs, 6 Wall. 402, 410; Smith v. Brannan, 13 Cal. 107, 114; Merced Min. Co. v. Fremont, 7 Cal. 317, 319; 68 Am. Dec. 262; Giltenan v. Lemert, 13 Kan. 476; Meighen v. Strong, 6 Minn. 177, 179. See also Pierce v. Felter, 53 Cal. 18; Stoddart v. Burge, 53 Cal. 394, — under a statute of the second class. In New York, however, a plaintiff must have been in possession for three years, claiming an estate in fee, for life, or for a term of years not less than ten. In general, *some* interest is necessary: See note preceding last. A possessory title is held sufficient to maintain the action to quiet title to a mining claim located on public lands of the United States: Pralus v. Pacific etc. Min. Co., 35 Cal. 30; Merced Min. Co. v. Fremont, 7 Cal. 317; 68 Am. Dec. 262. A mere trespasser on government land cannot maintain the action: Wood v. Missouri etc. R'y, 11 Kan. 323. A question has arisen in states of this class, which cannot very well arise in those of the second class, as to the effect of the statutes on the remedies of a plaintiff out of possession. It has been contended that the statutes have deprived such a plaintiff of any equitable remedy which he might otherwise have, leaving as his only resort ejectment, or a legal action to recover possession. The answer, on principle, is plain: equity is not deprived of its jurisdiction except by express language or necessary implication; none of these statutes contain such prohibitory language, nor can they be so construed as to deprive equity of jurisdiction to grant its ordinary remedies. Again, in those states which have adopted the reformed procedure, all remedies, legal and equitable, are unaffected: Pomeroy on Remedies, sec. 69. While it is evident that a party out of possession holding a legal title must resort to ejectment, as before, to

going differences, possession is not required in states of the second class; the action may therefore be brought here in cases where a party at common law would be left to his remedy by ejectment.[2] Several of the statutes in express terms allow the action to be brought to remove clouds from title;[3] others are sufficiently general to include this as well as other adverse claims.[4]

§ 1398. Suit to Remove a Cloud from Title.—The jurisdiction of courts of equity to remove clouds from title is well settled,[1] the relief being granted on the principle *quia*

recover possession: Curtis v. Sutter, 15 Cal. 259, 264; Van Winkle v. Hinckle, 21 Cal. 342; King v. Carpenter, 37 Mich. 363; Moran v. Palmer, 13 Mich. 367; Methodist Church of Newark v. Clark, 41 Mich. 730; it is equally evident that the statutes do not prevent a party out of possession from applying for equitable relief, — as, for example, to have a cloud removed or prevent a cloud from being cast on his title: King v. Carpenter, 37 Mich. 363; Ormsby v. Barr, 22 Mich. 80; Low v. Staples, 2 Nev. 209; Pier v. Fond du Lac, 38 Wis. 470; Jones v. Smith, 22 Mich. 360; see also Harral v. Gray, 10 Neb. 186, 188.

[2] See Lewis v. Soule, 52 Iowa, 11, 13.

[3] See the statutes of Illinois, Mississippi, and New Jersey; also that of Georgia.

[4] Head v. Fordyce, 17 Cal. 149; Maxon v. Ayers, 28 Wis. 612; Dean v. Madison, 9 Wis. 402; Lewis v. Soule, 52 Iowa, 11, 13.

As to the effect of the judgment in this statutory action, see Green v. Glynn, 71 Ind. 336; Reed v. Calderwood, 32 Cal. 109. As to the proper or necessary parties in all such suits to quiet title, see Pomeroy on Remedies, secs. 369–372; Flanders v. McClanahan, 24 Iowa, 486; Thomas v. Kennedy, 24 Iowa, 397; 95 Am. Dec. 740; Beckwith v. Dargets, 18 Iowa, 303; Pierce v. Faunce, 47 Me. 507; Newman v. Home Ins. Co., 20 Minn. 422; Johnson v. Robinson, 20 Minn. 170; Durham v. Bischof, 47 Ind. 211; Haley v. Bagley, 37 Mo. 363; Mills v. Buttrick, 4 Col. 123; Bush v. Hicks, 60 N. Y. 298; Fisher v. Hepburn, 48 N. Y. 41, 55.

[1] Hayward v. Dimsdale, 17 Ves. 111; Mayor of Colchester v. Lowten, 1 Ves. & B. 226, 244; Pettit v. Shepherd, 5 Paige, 493, 501; Apthorp v. Comstock, 2 Paige, 482; Peirsoll v. Elliott, 6 Pet. 95, 98. Formerly there seems to have been some doubt as to the jurisdiction. Cancellation is the ordinary remedy in removing clouds. It is equally well established that equity has jurisdiction to prevent, by means of injunctions, clouds from being cast on titles: Pettit v. Shepherd, 5 Paige, 493; 28 Am. Dec. 437; Oakley v. Trustees etc., 6 Paige, 262; Shattuck v. Carson, 2 Cal. 588; Norton v. Beaver, 5 Ohio, 178; Bank of U. S. v. Schultz, 2 Ohio, 471; Groves v. Webber, 72 Ill. 606; O'Hare v. Downing, 130 Mass. 16; Mann v. City of Utica, 44 How. Pr. 334; Sanders v. Village of Yonkers, 63 N. Y. 489; Merriman v. Polk, 5 Heisk. 717. See, in this connection, Drake v. Jones, 27 Mo. 428. The danger,

timet,— that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title.[2]

§ 1399. **When the Jurisdiction is Exercised — General Doctrine.**— Whether or not the jurisdiction will be exercised depends upon the fact that the estate or interest to be protected is equitable in its nature, or that the remedies at law are inadequate where the estate or interest is legal,— a party being left to his legal remedy where his estate or interest is legal in its nature, and full and complete justice can thereby be done.[1] While a court of equity will set

however, in such cases must be imminent, and not merely speculative or potential: Sanders v. Village of Yonkers, *supra*. Cases for preventing and removing clouds from title depend generally upon the same principles, and will be discussed together. For statutory proceedings to remove clouds from title, see § 1397.

2 1 Fonblanque's Equity, b. 1, c. 1, sec. 8, note *y*. See also Shell v. Martin, 19 Ark. 139, 141; Hager v. Shindler, 29 Cal. 47, 55; Eckman v. Eckman, 55 Pa. St. 269, 273.

1 De Witt v. Hays, 2 Cal. 463; 56 Am. Dec. 352; Hager v. Shindler, 29 Cal. 47; Gage v. Rohrbach, 56 Ill. 262, 266; Gage v. Billings, 56 Ill. 268; Budd v. Long, 13 Fla. 288; Lockwood v. City of St. Louis, 24 Mo. 20; Hall v. Whiston, 5 Allen, 126; Hinckley v. Greany, 118 Mass. 595; Daniel v. Stewart, 55 Ala. 278; Redmond v. Packenham, 66 Ill. 434; Martin v. Graves, 5 Allen, 601; Sullivan v. Finnegan, 101 Mass. 447; Plant v. Barclay, 56 Ala. 561; Jones v. De Graffenreid, 60 Ala. 145; Grigg v. Swindal, 67 Ala. 187; Miller v. Neiman, 27 Ark. 233; Crane v. Randolph, 30 Ark. 579; Munson v. Munson, 28 Conn. 582; 73 Am. Dec. 693; Commonwealth v. Smith, 10 Allen, 448; 87 Am. Dec. 672; Kennedy v. Northup, 15 Ill. 148; Moran v. Palmer, 13 Mich. 367; King v. Carpenter, 37 Mich. 363; Branch v. Mitchell, 24 Ark. 431.

As to whether possession by a plaintiff is necessary before he can resort to equity to remove a cloud, there appears to be some conflict of opinion, arising from loose and careless statements of judges, and an overlooking of the principles of equity in regard to the exercise of its jurisdiction. When the estate or interest to be protected is equitable, the jurisdiction should be exercised whether the plaintiff is in or out of possession, for under these circumstances legal remedies are not possible; but when the estate or interest is legal in its nature, the exercise of the jurisdiction depends upon the adequacy of legal remedies. Thus, for example, a plaintiff out of possession, holding the legal title, will be left to his remedy by ejectment, under ordinary circumstances: Burton v. Gleason, 56 Ill. 25; Polk v. Pendleton, 31 Md. 118; Branch v. Mitchell, 24 Ark. 431, 439; Moran v. Palmer, 13 Mich. 367, 370; Crane v. Randolph, 30 Ark. 579; Munson v. Munson, 28 Conn. 582; King v. Carpenter, 37 Mich. 363; Lawrence v. Zimpleman, 37

aside a deed, agreement, or proceeding affecting real estate, where extrinsic evidence is necessary to show its invalidity, because such instrument or proceeding may be used for annoying and injurious purposes at a time when the evidence to contest or resist it may not be as effectual as if used at once,[2] still, if the defect appears upon its face,

Ark. 643; Odle v. Odle, 73 Mo. 289. But where he is *in possession*, and thus unable to obtain any adequate legal relief, he may resort to equity: Gage v. Rohrbach, 56 Ill. 262, 266; Gage v. Billings, 56 Ill. 268; Jones v. De Graffenreid, 60 Ala. 145, 151; Hinckley v. Greany, 118 Mass. 595; Sullivan v. Finnegan, 101 Mass. 447; Clouston v. Shearer, 99 Mass. 209; Branch v. Mitchell, 24 Ark. 431, 439. Where, on the other hand, a party out of possession has an equitable title, or where he holds the legal title under circumstances that the law cannot furnish him full and complete relief, his resort to equity to have a cloud removed ought not to be questioned: Redmond v. Packenham, 66 Ill. 434; Plant v. Barclay, 56 Ala. 561; Thompson v. Lynch, 29 Cal. 189; Hager v. Shindler, 29 Cal. 47; Kennedy v. Northup, 15 Ill. 148, 152; Branch v. Mitchell, 24 Ark. 431, 439; King v. Carpenter, 37 Mich. 363; Ormsby v. Barr, 22 Mich. 80, 84; Low v. Staples, 2 Nev. 209, 212; Pier v. Fond du Lac, 38 Wis. 470; Lawrence v. Zimpleman, 37 Ark. 643, 645; Booth v. Wiley, 102 Ill. 84, 114. While it cannot be said that the cases are uniform on the above propositions, still it is believed that the rule stated in the text and the above explanations are founded on principle and are sufficient to reconcile a vast majority of the conflicting, or apparently conflicting, judicial opinions and *dicta* on this question. In some of the cases the rule is so broadly stated as to require a plaintiff, seeking to have a cloud removed, under all circumstances to be in possession: Orton v. Smith, 18 How. 263; Daniel v. Stewart, 55 Ala. 278; Arnett v. Bailey, 60 Ala. 435; Tyson v. Brown, 64 Ala. 244; Baines v. Barnes, 64 Ala. 375; Smith's Ex'r v. Cockrell, 66 Ala. 64; Miller v. Neiman, 27 Ark. 233; Keane v. Kyne, 66 Mo. 216; Haythorn v. Margerem, 7 N. J. Eq. 324; Busbee v. Lewis, 85 N. C. 332; Herrington v. Williams, 31 Tex. 448; Clark v. Covenant etc. Ins. Co., 52 Mo. 272; while, on the other hand, it is as generally stated that possession is never essential: Almony v. Hicks, 3 Head, 39; Hager v. Shindler, 29 Cal. 47; Thompson v. Lynch, 29 Cal. 189; Bunch v. Gallagher, 5 Blatchf. 481; Jones v. Smith, 22 Mich. 360. Both of these extreme views are open to criticism, and the cases should always be considered with reference to the facts actually before the court.

2 Crooke v. Andrews, 40 N. Y. 547; Newell v. Wheeler, 48 N. Y. 486; Ward v. Dewey, 16 N. Y. 519; Radcliff v. Rowley, 2 Barb. Ch. 23; Longley v. City of Hudson, 4 Thomp. & C. 353; Congregation Shaarai Tephila v. Mayor etc., 53 How. Pr. 213; Daniel v. Stewart, 55 Ala. 278; Lockett v. Hurt, 57 Ala. 198; Lick v. Ray, 43 Cal. 83; Alden v. Trubee, 44 Conn. 455; Brooks v. Kearns, 86 Ill. 547; Clark v. Covenant etc. Ins. Co., 52 Mo. 272; Johnson v. Cooper, 2 Yerg. 524; 24 Am. Dec. 502; Almony v. Hicks, 3 Head, 39; Bunce v. Gallagher, 5 Blatchf. 481; Smith v. Fellows, 9

and a resort to extrinsic evidence is unnecessary, the reason for equitable interference does not exist, for it cannot be said that any cloud whatever is cast upon the title.[3] Cases showing various conditions of facts in instruments creating clouds, and when jurisdiction will be exercised, are given in the foot-note. In the absence of statutes giving a *prima facie* validity to deeds or other proceedings, the following doctrine seems to be sustained by the great majority of the American decisions: Where the instrument or proceeding constituting the alleged cloud is absolutely void on its face, so that no extrinsic evidence is necessary to show its invalidity, and where the instrument or proceeding is not thus void on its face, but the party claiming under it, in order to enforce it, *must necessarily* offer evidence which will *inevitably* show its invalidity and destroy its efficacy,— in each of these cases the court will not exercise its jurisdiction either to restrain or to remove

Jones & S. 36; Barton v. Drake, 21 Minn. 299. A case for the interposition of equity is made the stronger by the fact that parol testimony is essential to show the invalidity: See the preceding cases. In Waterbury Sav. Bank v. Lawler, 46 Conn. 243, 246, it was held that relief would not be given where the rebutting evidence was a matter of record, and easily obtained. See also Haines's Appeal, 73 Pa. St. 169.

[3] Simpson v. Lord Howden, 3 Mylne & C. 97, 102, 103, 108, and cases cited; Cox v. Clift, 2 N. Y. 118; Van Doren v. Mayor etc., 9 Paige, 388; Heywood v. City of Buffalo, 14 N. Y. 534; Overing v. Foote, 43 N. Y. 290; Marsh v. City of Brooklyn, 59 N. Y. 280; Levy v. Hart, 54 Barb. 248; Tilden v. Mayor etc., 56 Barb. 340; Mulligan v. Baring, 3 Daly, 75; Howell v. City of Buffalo, 2 Abb. App. 412; Farnham v. Campbell, 34 N. Y. 480; Dederer v. Voorhies, 81 N. Y. 153; Stuart v. Palmer, 74 N. Y. 183; 30 Am. Rep. 289; Townsend v. Mayor etc., 77 N. Y. 542; Wells v. City of Buffalo, 80 N. Y. 253; Peirsoll v. Elliott, 6 Pet. 95; Posey v. Conaway, 10 Ala. 811; Cohen v. Sharp, 44 Cal. 29; Head v. James, 13 Wis. 641; Shepardson v. Supervisors, 28 Wis. 593; Briggs v. Johnson, 71 Me. 235; Busbee v. Macy, 85 N. C. 329; Minturn v. Smith, 3 Saw. 142; Curtis v. City of East Saginaw, 35 Mich. 508. See the rule as stated in Merchants' Bank v. Evans, 51 Mo. 335, 345.

In many states, deeds, certificates, and other instruments given on sales for taxes are made *prima facie* evidence by statute of the regularity of proceedings connected with the assessments and sales, and it is well settled that courts of equity will set aside such instruments for defects, although such defects are apparent on the faces of the instruments: Scott v. Onderdonk, 14 N. Y. 9; 67 Am. Dec. 106; Huntington v. Cent. Pac. R. R., 2

a cloud, for the assumed reason that there *is* no cloud.[4] While this doctrine may be settled by the weight of authority, I must express the opinion that it often operates to produce a denial of justice. It leads to the strange scene, almost daily in the courts, of defendants urging that the

Saw. 503; Palmer v. Rich, 12 Mich. 414; Marquette etc. R. R. v. City of Marquette, 35 Mich. 504; Weller v. City of St. Paul, 5 Minn. 95; Allen v. City of Buffalo, 39 N. Y. 386; Hatch v. City of Buffalo, 38 N. Y. 276; Crooke v. Andrews, 40 N. Y. 547; Lewis v. City of Buffalo, 29 How. Pr. 335; Johnson v. Stevens, 13 How. Pr. 132; Mann v. City of Utica, 44 How. Pr. 334; Astor v. Mayor etc., 5 Jones & S. 539; Lennon v. Mayor etc., 5 Daly, 347; Nichols v. Voorhis, 9 Hun, 171; Masterson v. Hoyt, 55 Barb. 520.

[4] *Deeds:* Lyon v. Hunt, 11 Ala. 295; 46 Am. Dec. 216; Hunt v. Acre, 28 Ala. 580; Barclay v. Henderson, 44 Ala. 269; Daniel v. Stewart, 55 Ala. 278; Lockett v. Hurt, 57 Ala. 198; Posey v. Conaway, 10 Ala. 811; Florence v. Paschal, 50 Ala. 28; Plant v. Barclay, 56 Ala. 561; Jones v. De Graffenreid, 60 Ala. 145; Arnett v. Bailey, 60 Ala. 435; Tyson v. Brown, 64 Ala. 244; Baines v. Barnes, 64 Ala. 375; Smith's Ex'r v. Cockrell, 66 Ala. 64; Grigg v. Swindal, 67 Ala. 187; Shell v. Martin, 19 Ark. 139; Walker v. Peay, 22 Ark. 103; Miller v. Neiman, 27 Ark. 233; Crane v. Randolph, 30 Ark. 579; Riley v. Pehl, 23 Cal. 70; Hager v. Shindler, 29 Cal. 47; Thompson v. Lynch, 29 Cal. 189; Lick v. Ray, 43 Cal. 83; Cohen v. Sharp, 44 Cal. 29; Alden v. Trubee, 44 Conn. 455; Munson v. Munson, 28 Conn. 582; 73 Am. Dec. 693; Stout v. Cook, 37 Ill. 283; Reed v. Tyler, 56 Ill. 288; Gage v. Billings, 56 Ill. 268; Reed v. Reber, 62 Ill. 240; Lee v. Ruggles, 62 Ill. 427; Kennedy v. Northup, 15 Ill. 149; Redmond v. Packenham, 66 Ill. 434; Brooks v. Kearns, 86 Ill. 547; Burton v. Gleason, 56 Ill. 25; Peck v. Sexton, 41 Iowa, 566; Gerry v. Stimson, 60 Me. 186; Polk v. Rose, 25 Md. 153; 89 Am. Dec. 773; Polk v. Reynolds, 31 Md. 106; Polk v. Pendleton, 31 Md. 118; Briggs v. Johnson, 71 Me. 235; Martin v. Graves, 5 Allen, 601; Burns v. Lynde, 6 Allen, 305; Sullivan v. Finnegan, 101 Mass. 447; Russell v. Deshon, 124 Mass. 342; Davis v. City of Boston, 129 Mass. 377; Merchants' Bank v. Evans, 51 Mo. 335; Clark v. Covenant etc. Ins. Co., 52 Mo. 272; Harrington v. Utterback, 57 Mo. 519; Keane v. Kyne, 66 Mo. 216; Haythorn v. Margerem, 7 N. J. Eq. 324; Downing v. Wherrin, 19 N. H. 9, 91; 49 Am. Dec. 139; Hall v. Fisher, 9 Barb. 17; Buffalo etc. R. R. v. Lampson, 47 Barb. 533; Remington Paper Co. v. O'Dougherty, 81 N. Y. 484; Cox v. Clift, 2 N. Y. 118; Bockes v. Lansing, 74 N. Y. 437; Hotchkiss v. Elting, 36 Barb. 38; Levy v. Hart, 54 Barb. 248; Busbee v. Macy, 85 N. C. 329; Busbee v. Lewis, 85 N. C. 332; Jones's Heirs v. Perry, 10 Yerg. 59; 30 Am. Dec. 430; Johnson v. Cooper, 2 Yerg. 524; 24 Am. Dec. 502; Almony v. Hicks, 3 Head, 39; Carter v. Taylor, 3 Head, 30; Butler v. Rutledge, 2 Cold. 4; Whillock v. Grisham, 3 Sneed, 237; Williams v. Williams, 7 Baxt. 116; Huffman v. Huffman, 1 Lea, 491; Jones v. Neale, 2 Pat. & H. 339; Carroll v. Brown, 28 Gratt. 791; Willis v. Sweet, 49 Wis. 505; Bunce v. Gallagher, 5 Blatchf. 481; Peirsoll v. Elliott, 6 Pet. 95.

instruments under which they claim *are void, and therefore that they ought to be permitted to stand unmolested,* and of judges deciding that the court cannot interfere, *because the deed or other instrument is void,* while from a business point of view every intelligent person knows that the in-

Mortgages: Ramsdell v. Fuller, 28 Cal. 37; 87 Am. Dec. 103; City of Hartford v. Chipman, 21 Conn. 488; Sherman v. Fitch, 98 Mass. 59 (personal property); Clouston v. Shearer, 99 Mass. 209; Comm. v. Smith, 10 Allen, 448; 87 Am. Dec. 672; Vogler v. Montgomery, 54 Mo. 577; Ward v. Dewey, 16 N. Y. 519; Smith v. Fellows, 9 Jones & S. 36; Eldridge v. Smith, 34 Vt. 484.

Assessments for taxes: See last preceding note; De Witt v. Hays, 2 Cal. 463; 56 Am. Dec. 352; Minturn v. Smith, 3 Saw. 142; Waterbury Sav. Bank v. Lawler, 46 Conn. 243; Gage v. Rohrbach, 56 Ill. 262; Gage v. Chapman, 56 Ill. 311; Barnett v. Cline, 60 Ill. 205; Holland v. Mayor etc., 11 Md. 186; 69 Am. Dec. 195; Scofield v. City of Lansing, 17 Mich. 437; Henry v. Gregory, 29 Mich. 68; Curtis v. City of East Saginaw, 35 Mich. 508; Lockwood v. City of St. Louis, 24 Mo. 20; Fowler v. City of St. Joseph, 37 Mo. 228; McPike v. Pen, 51 Mo. 63; Johnson v. Hahn, 4 Neb. 139; Morris Canal etc. Co. v. Jersey City, 12 N. J. Eq. 227; Longley v. City of Hudson, 4 Thomp. & C. 353; Newell v. Wheeler, 48 N. Y. 486; Cong. Shaarai Tephila v. Mayor etc., 53 How. Pr. 213; Hebrew etc. Ass'n v. Mayor etc., 4 Hun, 446; Dederer v. Voorhies, 81 N. Y. 153; Van Doren v. Mayor etc., 9 Paige, 388; Heywood v. City of Buffalo, 14 N. Y. 534; Howell v. City of Buffalo, 2 Abb. App. 412; Overing v. Foote, 43 N. Y. 290; Tilden v. Mayor etc., 56 How. 340; Sanders v. Village of Yonkers, 63 N. Y. 489; Marsh v. City of Brooklyn, 59 N. Y. 280; Guest v. City of Brooklyn, 69 N. Y. 506; Stuart v. Palmer, 74 N. Y. 183; 30 Am. Rep. 289; Townsend v. Mayor etc., 77 N. Y. 542; Wells v. City of Buffalo, 80 N. Y. 253; Burnet v. Corp. of Cincinnati, 3 Ohio, 73; 17 Am. Dec. 582; Culbertson v. City of Cincinnati, 16 Ohio 574; Shepardson v. Supervisors, 28 Wis. 593; Milwaukee Iron Co. v. Town of Hubbard, 29 Wis. 51; Hamilton v. City of Fond du Lac, 25 Wis. 490; Head v. James, 13 Wis. 641.

Judgments and executions: Burt v. Cassety, 12 Ala. 734; Ala. etc. Co. v. Pettway, 24 Ala. 544; Rea v. Longstreet, 54 Ala. 291; Pixley v. Huggins, 15 Cal. 127; Englund v. Lewis, 25 Cal. 337; Shattuck v. Carson, 2 Cal. 588; Hall v. Theisen, 9 Pac. C. L. J. 479; Budd v. Long, 13 Fla. 288; Davidson v. Seegar, 15 Fla. 671; Campbell v. McCahan, 41 Ill. 45; Tucker v. Conwell, 67 Ill. 552; Henderson v. Palmer, 71 Ill. 579; 22 Am. Rep. 117; Groves v. Webber, 72 Ill. 606; Key City etc. Co. v. Munsell, 19 Iowa, 305; Hall v. Whiston, 5 Allen, 126; Hinckley v. Greany, 118 Mass. 595; O'Hare v. Downing, 130 Mass. 16; Barton v. Drake, 21 Minn. 299; Hanson v. Johnson, 20 Minn. 194; Drake v. Jones, 27 Mo. 428; Uhl v. May, 5 Neb. 157; Tucker v. Kenniston, 47 N. H. 267; 93 Am. Dec. 425; Radcliff v. Rowley, 2 Barb. Ch. 23; Lounsbury v. Purdy, 18 N. Y. 515; Tisdale v. Jones, 38 Barb. 523; Brown v. Goodwin, 75 N. Y. 409; Fonda v. Sage, 48 N. Y. 173; Farnham v. Campbell, 34 N. Y. 480; Schroeder v. Gurney, 73 N. Y. 430; Mulligan v. Bar-

strument is a serious injury to the plaintiff's title, greatly depreciating its market value, and the judge himself who repeats the rule would neither buy the property while thus affected nor loan a dollar upon its security. This doctrine is, in truth, based upon mere verbal logic, rather than upon considerations of justice and expediency.

ing, 3 Daly, 75; Tear v. Mathews, Wright, 371; Bank of U. S. v. Schultz, 2 Ohio, 471; Norton v. Beaver, 5 Ohio, 178; Merriman v. Polk, 5 Heisk. 717; Rooney v. Soule, 45 Vt. 303; Goodell v. Blumer, 41 Wis. 436; Gamble v. Loop, 14 Wis. 465; Moore v. Cord, 14 Wis. 213; Standish v. Dow, 21 Iowa, 363.

Miscellaneous cases: Mayor etc. v. North Shore etc. Co., 9 Hun, 620 (lease); Spofford v. Bangor etc. R. R., 66 Me. 51 (ditto); Larmon v. Jordan, 56 Ill. 204 (land contract placed on record); Sea v. Morehouse, 79 Ill. 216 (ditto); Boyd v. Schlesinger, 59 N. Y. 301 (ditto); Washburn v. Burnham, 63 N. Y. 132 (ditto); Nickerson v. Loud, 115 Mass. 94 (papers recorded giving notice of claim to land); Sanxay v. Hunger, 42 Ind. 44 (papers recorded giving notice of dispute as to right of way); Yauger v. Skinner, 14 N. J. Eq. 389 (findings of commission of lunacy).

FIFTH GROUP.

REMEDIES BY WHICH EQUITABLE OBLIGATIONS ARE SPECIFICALLY AND DIRECTLY ENFORCED.

CHAPTER FIRST.

SPECIFIC PERFORMANCE OF CONTRACTS.

ANALYSIS.

§ 1400. Nature and object.
§ 1401. Specific performance of contracts; grounds of the jurisdiction.
§ 1402. Extent of the jurisdiction; inadequacy of damages; various kinds of contracts.
§ 1403. The same: Impracticability of the legal remedy.
§ 1404. The jurisdiction discretionary.
§ 1405. Essential elements and incidents.
§ 1406. Rights under the contract; effect of events without the agency of the parties.
§ 1407. Performance by plaintiff a condition precedent.
§ 1408. Time as affecting the right to a performance.
§ 1409. Enforcement of verbal contracts part performed.
§ 1410. Damages in place of a specific performance.

§ 1400. **Nature and Object.**— The remedies embraced in this group are all purely equitable, and the rights of the complainant and obligations of the defendant which are enforced by their means are also equitable.[1] They belong, therefore, to the exclusive jurisdiction of equity. Their distinctive object is to specifically enforce the complainant's equitable right, and to compel the defendant to specifically perform the actual equitable obligation which rests upon him. This group, as a whole, contains the specific performance of contracts, including the performance of

1 Although contracts may also give rise to a legal right, yet when equity compels their specific performance, it enforces the equitable obligation arising from them, and not the legal duty. In most cases, it turns the vendee's equitable *estate* into a legal one.

verbal contracts for the sale of land which have been part performed, and the delivery up of specific chattels; the specific enforcement of trusts, express and implied; and the specific enforcement of obligations arising from fiduciary relations analogous to trusts.[2]

§ 1401. **Specific Performance of Contracts — Ground of the Jurisdiction.**— The remedy of the specific performance of contracts is purely equitable, given as a substitute for the legal remedy of compensation, whenever the legal remedy is inadequate or impracticable. In the language of Lord Selborne: "The principle which is material to be considered is, that the court gives specific performance instead of damages only when it can by that means *do more perfect and complete justice.*"[1] The jurisdiction depending upon this broad principle is exercised in two classes of cases: 1. Where the subject-matter of the contract is of such a special nature, or of such a peculiar value, that the damages, when ascertained according to legal rules, would not be a just and reasonable substitute for or representative of that subject-matter in the hands of the party who is entitled to its benefit; or in other words, where the damages are *inadequate;* 2. Where, from some special and practical features or incidents of the contract inhering

[2] The indirect specific enforcement of certain contracts by means of an injunction has already been considered in a preceding chapter (§§ 1341–1344), and will not be here discussed.

[1] Wilson v. Northampton etc. R'y, L. R. 9 Ch. 279, 284. The foundation and measure of the jurisdiction is the desire to do justice, which the legal remedy would fail to give. This justice is primarily due to the plaintiff, but not exclusively, for the equities of the defendant are also protected. Specific performance is, therefore, a conscious attempt on the part of the court to do complete justice to both the parties with respect to all the judicial relations growing out of the contract between them: See Buxton v. Lister, 3 Atk. 383; Wright v. Bell, 5 Price, 325, 328, 329; Adderley v. Dixon, 1 Sim. & St. 607, 610; Ord v. Johnston, 1 Jur., N. S., 1063, 1064. It follows, therefore, that the remedial right, if it exists at all, must be mutual; each party must be able to enforce the remedy against the other: Adderley v. Dixon, *supra;* Old Colony R. R. v. Evans, 6 Gray, 25; 66 Am. Dec. 394; Brown v. Haff, 5 Paige, 235; 28 Am. Dec. 425; Schroeppel v. Hopper, 40 Barb. 425; Hopper v. Hopper, 16 N. J. Eq. 147; but see Jones v. Newhall, 115 Mass. 244; 15 Am. Rep. 97.

either in its subject-matter, in its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty, so that *no* real compensation can be obtained by means of an action at law; or in other words, where damages are *impracticable*.[2]

§ 1402. **Extent of the Jurisdiction — Inadequacy of Damages.** — The object of the present discussion is to determine the general classes of contracts which come within the jurisdiction, and which may be specifically enforced. Whether any particular contract belonging to one of these classes will actually be thus enforced depends upon other equitable elements, to be described hereafter. *Lands:* Where land, or any estate therein, is the subject-matter of the agreement, the inadequacy of the legal remedy is well settled, and the equitable jurisdiction is firmly established.[1] When-

[2] The ground of the jurisdiction may be practically stated thus: that an award of damages will not put the party in a situation as beneficial to him as if the agreement were specifically performed: Harnett v. Yielding, 2 Schoales & L. 549, 553; Phyfe v. Wardell, 2 Edw. Ch. 47; Stuyvesant v. The Mayor etc., 11 Paige, 414; Richmond v. Dubuque etc. R. R., 33 Iowa, 422; Blanchard v. Detroit etc. R. R., 31 Mich. 43; 18 Am. Rep. 142; Bogan v. Daughdrill, 51 Ala. 312; Willard v. Tayloe, 8 Wall. 557; Somerby v. Buntin, 118 Mass. 279; 19 Am. Rep. 459; McGarvey v. Hall, 23 Cal. 140.

[1] Harnett v. Yielding, 2 Schoales & L. 549, 553, 554; Adderley v. Dixon, 1 Sim. & St. 607; Cud v. Rutter, 1 P. Wms. 570, 571; Hollis v. Edwards, 1 Vern. 159; Duff v. Fisher, 15 Cal. 375; McGarvey v. Hall, 23 Cal. 140; Kirksey v. Fike, 27 Ala. 383; 62 Am. Dec. 768; Bogan v. Daughdrill, 51 Ala. 312; Barnes v. Barnes, 65 N. C. 261; Richmond v. Dubuque etc. R. R., 33 Iowa, 422; Blanchard v. Detroit etc. R. R., 31 Mich. 43; 18 Am. Rep. 142; Willard v. Tayloe, 8 Wall. 557; Somerby v. Buntin, 118 Mass. 279; 19 Am. Rep. 459. *Contracts to give or renew a lease:* Furnival v. Crew, 3 Atk. 83, 87; Tritton v. Foote, 2 Brown Ch. 636; Burke v. Smyth, 3 Jones & L. 193; Moss v. Barton, L. R. 1 Eq. 474; Buckland v. Papillon, L. R. 2 Ch. 67; Clark v. Clark, 49 Cal. 586; Switzer v. Gardner, 41 Mich. 164. *Contracts for mortgages:* Ashton v. Corrigan, L. R. 13 Eq. 76; Hermann v. Hodges, L. R. 16 Eq. 18; De Pierres v. Thorn, 4 Bosw. 266; City etc. Ins. Co. v. Olmsted, 33 Conn. 476; St. Paul Division etc. v. Brown, 11 Minn. 356; McClintock v. Laing, 22 Mich. 212; Dean v. Anderson, 34 N. J. Eq. 496. *Family settlements:* Wistar's Appeal, 80 Pa. St. 484; Henry v. Henry, 27 Ohio St. 121. *Bond to convey land:* Ewins v. Gordon, 49 N. H. 444. *Contracts concerning land in another country or state:* Penn v. Lord Baltimore, 1 Ves. Sr. 444; Lord Portarlington v. Soulby, 3 Mylne & K. 104; Sutphen v. Fowler, 9 Paige, 280; Brown v. Desmond, 100 Mass. 267; Davis v. Parker, 14 Allen, 94. For

ever a contract concerning real property is in its nature and incidents entirely unobjectionable,— when it possesses none of those features which, in ordinary language, influence the discretion of the court,— it is as much a matter of course for a court of equity to decree its specific performance as it is for a court of law to give damages for its breach. *Chattels:* On the contrary, the doctrine is equally well settled that equity will not, in general, decree the specific performance of contracts concerning chattels, because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality.[2] *Exceptions:* Where, however, particular chattels have some special value to the owner over and above any pecuniary estimate,— the *pretium affectionis,*— and where they are unique, rare, and incapable of being reproduced by money damages, equity will decree a specific delivery of them to their owner, and the specific performance of contracts concerning them.[3] *Things in*

other contracts concerning land, see Johnson v. Johnson, 40 Md. 189; McNamee v. Withers, 37 Md. 171; Bleakley's Appeal, 66 Pa. St. 187; Seichrist's Appeal, 66 Pa. St. 237; Rogers v. Williams, 8 Phila. 123; Green v. Richards, 23 N. J. Eq. 32, 536; Colgate's Ex'r v. Colgate, 23 N. J. Eq. 372; Reynolds v. O'Neil, 26 N. J. Eq. 223; Wynn v. Smith, 40 Ga. 457; Porter v. Allen, 54 Ga. 623; Riddle v. Cameron, 50 Ala. 263; Warren v. Daniels, 72 Ill. 272; Yoakum v. Yoakum, 77 Ill. 85; Page Co. v. American etc. Co., 41 Iowa, 115; Warren v. Ewing, 34 Iowa, 168; Law v. Henry, 39 Ind. 414; Au Gres Boom Co. v. Whitney, 26 Mich. 42; Williams v. McGuire, 60 Mo. 254; Kuhn v. Freeman, 15 Kan. 423; Reese v. Board of Police etc., 49 Miss. 639; Grier v. Rhyne, 69 N. C. 346; Wright v. Pucket, 22 Gratt. 370; Ambrouse's Heirs v. Keller, 22 Gratt. 769; Chartier v. Marshall, 51 N. H. 400; Hayes v. Harmony Grove Cemetery, 108 Mass. 400; McClaskey v. Mayor etc., 64 Barb. 310; Olney v. Eaton, 66 Mo. 563; Gartrell v. Stafford, 12 Neb. 545; 41 Am. Rep. 767; Wormley v. Wormley, 98 Ill. 544; Bonner v. Little, 38 Ark. 397; Coffman v. Robbins, 8 Or. 278.

2 Cud v. Rutter, 1 P. Wms. 570; Nutbrown v. Thornton, 10 Ves. 159; Adderley v. Dixon, 1 Sim. & St. 607, 608; Buxton v. Lister, 3 Atk. 383; Pierce v. Plumb, 74 Ill. 326; Collins v. Karatopsky, 36 Ark. 316; Bubier v. Bubier, 24 Me. 42; Cowles v. Whitman, 10 Conn. 121, 124; 25 Am. Dec. 60; Gram v. Stebbins, 6 Paige, 124; Phillips v. Berger, 2 Barb. 608; 8 Barb. 527; Scott v. Billgerry, 40 Miss. 119; McLaughlin v. Piatti, 27 Cal. 451; Ashe v. Johnson's Adm'r, 2 Jones Eq. 149.

3 This class includes,— 1. Articles of special value to their owner, but of no general pecuniary value; and 2. Articles of such great rarity and value

action: Contracts for the sale or assignment of things in action may be enforced by the purchaser, by compelling a transfer and delivery, where the legal damages might be too uncertain and conjectural to constitute an adequate compensation. And since the remedy must be mutual, the vendor may also maintain the action in such cases.[4] *Awards:* An award is treated as the continu-

that they cannot be replaced by money,— paintings, statues, etc. The jurisdiction will be exercised to compel their delivery by one who wrongfully detains them, or to compel the specific execution of a contract for their sale or delivery. As illustrations, see Pusey v. Pusey, 1 Vern. 273 (an ancient horn); Duke of Somerset v. Cookson, 3 P. Wms. 389 (an antique silver patera); Fells v. Read, 3 Ves. 70; Lloyd v. Loaring, 6 Ves. 773; Nutbrown v. Thornton, 10 Ves. 159, 161, 163; Wallwyn v. Lee, 9 Ves. 24, 33; Saville v. Tankred, 1 Ves. Sr. 101; 3 Swanst. 141, note; Wood v. Rowcliffe, 3 Hare, 304; 2 Phill. Ch. 382; Lady Arundell v. Phipps, 10 Ves. 139; Lowther v. Lord Lowther, 13 Ves. 95; Pearne v. Lisle, Amb. 75, 77; Falcke v. Gray, 4 Drew, 651 (rare works of art); Clark v. Flint, 22 Pick. 231; 33 Am. Dec. 733; McGowin v. Remington, 12 Pa. St. 56; 51 Am. Dec. 584 (valuable private maps and charts). Analogous to this jurisdiction and for the same reasons, equity will decree the delivery up to the lawful owner of deeds and other written muniments of title: Brown v. Brown, 1 Dick. 62; Tanner v. Wise, 3 P. Wms. 294. 296; Duncombe v. Mayer, 8 Ves. 320; Freeman v. Fairlie, 3 Mer. 29, 30; Reece v. Trye, 1 De Gex & S. 273; Lady Beresford v. Driver, 14 Beav. 387; 16 Beav. 134; Turner v. Letts, 20 Beav. 185, 191; Gibson v. Ingo, 6 Hare, 112; Cowles v. Whitman, 10 Conn. 121; 25 Am. Dec. 60; Hill v. Rockingham Bank, 44 N. H. 567. If a trust or fiduciary relation exists in reference to the chattels, if an express trust has been created by the contract or an implied trust has arisen from the acts or omissions of the parties, then equity will exercise its jurisdiction to compel the specific performance of such contract, whether the chattels are common or special, since the court will always enforce a trust: Wood v. Rowcliffe, 3 Hare, 304; 2 Phill. Ch. 382; Pooley v. Budd, 14 Beav. 34; Stanton v. Percival, 5 H. L. Cas. 257, 268; Clark v. Flint, 22 Pick. 231; Cowles v. Whitman, 10 Conn. 121; 25 Am. Dec. 60; Hill v. Rockingham Bank, 44 N. H. 567; McGowin v. Remington, 12 Pa. St. 56; 51 Am. Dec. 584; Abbott's Ex'r v. Reeves, 49 Pa. St. 494; 88 Am. Dec. 510; Peer v. Kean, 14 Mich. 354.

[4] Assignment of debts: Adderley v. Dixon, 1 Sim. & St. 607; Cutting v. Dana, 25 N. J. Eq. 265; purchase of an annuity: Withy v. Cottle, 1 Sim. & St. 174; Clifford v. Turrell, 1 Younge & C. Ch. 138; Kenney v. Wexham, 6 Madd. 355; assignment of patent rights: Cogent v. Gibson, 33 Beav. 557; Corbin v. Tracy, 34 Conn. 325; Somerby v. Buntin, 118 Mass. 279; 19 Am. Rep. 459; Binney v. Annan, 107 Mass. 94; 9 Am. Rep. 10. See also, as illustrations, Wright v. Bell, 5 Price, 325; Hughes v. Piedmont etc. Ins. Co., 55 Ga. 111; Tuttle v. Moore, 16 Minn. 123; Woodward v. Harris, 3 Sand. 272. *Stocks:* It is the settled rule in England and in the United States that contracts for public securities, government stocks, bonds, etc., will not be en-

ance of the agreement to submit. If it directs acts to be done which, if stipulated for in a contract, would render such contract capable of enforcement, then the award itself may be specifically enforced.[5] *Special contracts:* The jurisdiction does not depend upon the nature of the contract nor of the subject-matter, but it will be exercised wherever the legal remedy is inadequate. It has been applied to a great number of special agreements.[6] The cases of con-

forced, since they can always be bought in the market: Doloret v. Rothschild, 1 Sim. & St. 590; Shaw v. Fisher, 5 De Gex, M. & G. 596. But contracts for the sale of railway and other business corporation shares and bonds will be enforced in England: Duncuft v. Albrecht, 12 Sim. 189; Shaw v. Fisher, *supra;* Cheale v. Kenward, 3 De Gex & J. 27; Hawkins v. Maltby, L. R. 3 Ch. 188; 4 Ch. 200. The recent English reports abound in such cases. In the United States all such securities are ordinarily purchasable in the market, and the rule is settled by the weight of authority that contracts concerning stocks and bonds of corporations, like those concerning government securities, will not be specifically enforced: Fallon v. Railroad Co., 1 Dill. 121; Ross v. Union Pac. R'y, 1 Woolw. 26, 36; Bissell v. Farmers' and Mechanics' Bank, 5 McLean, 495; Cowles v. Whitman, 10 Conn. 121, 124, 25 Am. Dec. 60; Gram v. Stebbins, 6 Paige, 124; Carpenter v. Mutual etc. Ins. Co., 4 Sand. Ch. 408; Lowry v. Muldrow, 8 Rich. Eq. 241; Strasburg R. R. v. Echternacht, 21 Pa. St. 220; 60 Am. Dec. 49; Sullivan v. Tuck, 1 Md. Ch. 59; Ferguson v. Paschall, 11 Mo. 267. A few cases more incline towards the English rule: See Ashe v. Johnson's Adm'r, 2 Jones Eq. 149; Baldwin v. Commonwealth, 11 Bush, 417; Treasurer v. Commercial etc. Co., 23 Cal. 390; Todd v. Taft, 7 Allen, 371.

[5] For example, awards directing the conveyance of land, etc.: Blackett v. Bates, L. R. 1 Ch. 117; Norton v. Mascall, 2 Vern. 24; Hall v. Hardy, 3 P. Wms. 187; Memphis etc. R. R. v. Scruggs, 50 Miss. 284; Overby v. Thrasher, 47 Ga. 10; Story v. Norwich etc. R. R., 24 Conn. 94; Kirksey v. Fike, 27 Ala. 383; 62 Am. Dec. 768; McNeil v. Magee, 5 Mason, 244; Jones v. Boston Mill Corp., 4 Pick. 507; 16 Am. Dec. 358; Davis v. Havard, 15 Serg. & R. 165, 171; 16 Am. Dec. 537; Somerville v. Trueman's Devisees, 4 Har. & McH. 43; 1 Am. Dec. 389; Cook v. Vick, 2 How. (Miss.) 882; but not an award directing merely a payment of money: Hall v. Hardy, *supra;* Story v. Norwich etc. R. R., *supra;* Bubier v. Bubier, 24 Me. 42.

[6] These agreements are so various that it is difficult to classify them. The following cases are cited as illustrations: *Special contracts concerning chattels:* Buxton v. Lister, 3 Atk. 383; Taylor v. Neville, cited 3 Atk. 384; Duke of Buckingham v. Ward, cited 3 Atk. 385. *Agreement to pay off or discharge a mortgage:* Barkley v. Barkley, 14 Rich. Eq. 12; Bennett v. Abrams, 41 Barb. 619; Weir v. Mundell, 3 Brewst. 594; Howe v. Nickerson, 14 Allen, 400; Stark v. Wilder, 36 Vt. 752. *Contract to insure:* Tayloe v. Merchants' etc. Ins. Co., 9 How. 390; Carpenter v. Mut. etc. Ins. Co., 4 Sand. Ch. 408; Neville v. Merchants' etc. Ins. Co., 19 Ohio, 452; Wooddy v. Old

tracts for personal acts, and for building and construction, are considered in the foot-note.

Dominion Ins. Co., 31 Gratt. 362; 31 Am. Rep. 732. *Agreement to compromise and discharge a judgment:* Phillips v. Berger, 2 Barb. 608; 8 Barb. 527. *Agreement to indemnify:* Chamberlain v. Blue, 6 Blackf. 491; but *per contra*, Hoy v. Hansborough, Freem. (Miss.) 533. *Antenuptial contract concerning personal property:* Tarbell v. Tarbell, 10 Allen, 278; Sullings v. Sullings, 9 Allen, 234; Gough v. Crane, 3 Md. Ch. 119; 4 Md. 316. *Miscellaneous cases:* Thorn v. Comm'rs etc., 32 Beav. 490; Schotsmans v. Lancashire etc. R'y, L. R. 2 Ch. 332; Very v. Levy, 13 How. 345; Kirksey v. Fike, 27 Ala. 383, 62 Am. Dec. 768; McKnight v. Robbins, 5 N. J. Eq. 229, 642; Ashe v. Johnson's Adm'r, 2 Jones Eq. 149; Sullivan v. Tuck, 1 Md. Ch. 59; Hall v. Joiner, 1 S. C. 186; Starnes v. Newsom, 1 Tenn. Ch. 239; Furman v. Clark, 11 N. J. Eq. 306; Steward v. Winters, 4 Sand. Ch. 587; Stuyvesant v. Mayor etc., 11 Paige, 414; Hall v. Hiles, 2 Bush, 532; McMullen v. Vanzant, 73 Ill. 190; Watson v. Smith, 7 Or. 448 (contract of support); Shields v. Whitaker, 82 N. C. 516 (to apply land in payment of debts); Reilley v. Roberts, 34 N. J. Eq. 299 (to cancel judgment); Apperson v. Gogin, 3 Ill. App. 48 (to credit value of property on judgment); Reybold v. Herdman, 2 Del. Ch. 34 (indemnity); Williams v. Vreeland, 32 N. J. Eq. 135 (agreement to hold a legacy for benefit of a third person); Coffman v. Robbins, 8 Or. 278 (by riparian owners to divide water); Boardman v. Lake Shore etc. R'y, 84 N. Y. 157 (concerning preferred and guaranteed stock). *Contracts for personal acts:* As an almost universal rule, these contracts will not be directly enforced. (They may sometimes be indirectly enforced by injunction: §§ 1343, 1344.) There are a few special exceptions. As an illustration, agreements for separation between husband and wife will be specifically enforced, if valid: Wilson v. Wilson, 1 H. L. Cas. 538; 5 H. L. Cas. 40; 14 Sim. 405; Gibbs v. Harding, L. R. 5 Ch. 336; 8 Eq. 490; McCrocklin v. McCrocklin, 2 B. Mon. 370. *Contracts for building and construction:* In general, the specific performance of these contracts will not be decreed, because the court cannot, by its ordinary means and instrumentalities, enforce its decree: Errington v. Aynesly, 2 Brown Ch. 341; Lucas v. Commerford, 3 Brown Ch. 166; Paxton v. Newton, 2 Smale & G. 437; Mosely v. Virgin, 3 Ves. 184; e. g., to work a gravel pit: Flint v. Brandon, 8 Ves. 159; construction of a railway: South Wales R'y v. Wythes, 1 Kay & J. 186; 5 De Gex, M. & G. 880; Port Clinton R. R. v. Cleveland etc. R. R., 13 Ohio St. 544; Fallon v. R. R. Co., 1 Dill. 121; Ross v. Union Pac. R'y, 1 Woolw. 26; to work quarries: Booth v. Pollard, 4 Younge & C. 61; Marble Co. v. Ripley, 10 Wall. 339; or mines: Pollard v. Clayton, 1 Kay & J. 462. The English courts have established exceptions to this rule, and enforce such contracts in four classes of cases, viz.: 1. Where the agreement to erect a building is defined and certain: Mosely v. Virgin, 3 Ves. 184, 185; Flint v. Brandon, 8 Ves. 159, 164; Cubitt v. Smith, 10 Jur., N. S., 1123; Phillips v. Soule, 9 Gray, 233; and see Brace v. Wehnert, 25 Beav. 348. 2. Where the defendant has contracted to construct some defined work *on his own* land, and the plaintiff has a material interest therein not susceptible of adequate compensation in damages:

§ 1403. **The Same. Impracticability of a Legal Remedy.**— This ground of the jurisdiction includes two classes of cases: 1. Where, from the lack of some legal formality or condition in the contract, no action at law can be maintained; 2. Where, from some peculiar feature of the contract, either in its subject-matter or in its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty.[1] The most important instances in which the jurisdiction is referable to this ground are,— 1. Contracts which the plaintiff has not fully performed, or even cannot fully perform, on his part, but which equity enforces with compensation for his partial failure; 2. Contracts invalid at law, especially verbal contracts concerning land; 3. Contracts which are incomplete in their terms.

Storer v. Great W. R'y, 2 Younge & C. Ch. 48; Sanderson v. Cockermouth etc. R'y, 11 Beav. 497; Franklyn v. Tuton, 5 Madd. 469; Middleton v. Greenwood, 2 De Gex, J. & S. 142; Wilson v. West Hartlepool R'y, 2 De Gex, J. & S. 475; Wilson v. Northampton etc. R'y, L. R. 9 Ch. 279; Att'y-Gen. v. Mid-Kent R'y, L. R. 3 Ch. 100. 3. Where defendant has contracted to construct works on land acquired by conveyance from the plaintiff, etc.: So. Wales R'y v. Wythes, 1 Kay & J. 186, 200; Price v. Corpor. of Penzance, 4 Hare, 506; Wilson v. Furness R'y, L. R. 9 Eq. 28; Hood v. North East R'y, L. R. 5 Ch. 525; 8 Eq. 666; Firth v. Midland R'y, L. R. 20 Eq. 100. 4. Where there has been a part performance, so that the defendant is enjoying the benefits *in specie:* Price v. Corpor. of Penzance, 4 Hare, 506, 509. See also Stuyvesant v. Mayor etc., 11 Paige, 414 (constructing a drain); Birchett v. Bolling, 5 Munf. 442 (erecting a building); Whitney v. New Haven, 23 Conn. 624; Gregory v. Ingwersen, 32 N. J. Eq. 199 (to erect a structure).

[1] Under this head are included,— 1. Contracts in which the plaintiff has not performed, or even cannot perform, all the conditions on his part, so as to maintain an action at law, but which equity still may treat as binding and enforce. In such cases, if the contract is otherwise a proper one, equity will decree a specific performance with such allowances or compensations as are just: Mortlock v. Buller, 10 Ves. 292, 305, 306; Stewart v. Alliston, 1 Mer. 26, 32. Even where the partial failure or inability results from the plaintiff's own fault: Davis v. Hone, 2 Schoales & L. 341, 347; Voorhees v. De Meyer, 2 Barb. 37; Coale v. Barney, 1 Gill & J. 324; McCorkle v. Brown, 9 Smedes & M. 167. 2. Contracts not valid at all at law, but which equity treats as binding on the conscience. By far the most important are verbal contracts concerning land which are invalid by the statute of frauds, but which, if part performed, equity will enforce: Kirk v.

§ 1404. The Jurisdiction Discretionary.— The object of the foregoing paragraphs is to formulate the general rules which determine the classes of contracts in which the equitable jurisdiction *may* be exercised. But even when a particular contract belongs to such a class, the right to its specific performance is not absolute, like the right to recover a legal judgment. The granting the equitable remedy is, in the language ordinarily used, a matter of discretion, not of an arbitrary, capricious discretion, but of a sound judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case. Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach. This is the ordinary language of judges and text-writers.[1]

Bromley Union, 2 Phill. Ch. 640; Gough v. Crane, 3 Md. Ch. 119; 4 Md. 316; see *post*, § 1409, where this subject is treated. Under this head are also included certain agreements void at the old common law, but which equity enforces; e. g., assignments of expectancies; agreements to assign things in action; contracts between a man and woman, who afterwards marry: Cannel v. Buckle, 2 P. Wms. 243; Gould v. Womack, 2 Ala. 83. 3. Contracts incomplete in their terms: Buxton v. Lister, 3 Atk. 383; Doloret v. Rothschild, 1 Sim. & St. 590; Phillips v. Thompson, 1 Johns. Ch. 131.

[1] The following are a few illustrations: Radcliffe v. Warrington, 12 Ves. 326, 332; Joynes v. Statham, 3 Atk. 388; Underwood v. Hitchcox, 1 Ves. Sr. 279; Willard v. Tayloe, 8 Wall. 557, 565; Marble Co. v. Ripley, 10 Wall. 339, 356; Lowry v. Buffington, 6 W. Va. 249, 255; Fish v. Lightner, 44 Mo. 268, 272; Fish v. Leser, 69 Ill. 394, 395; Stone v. Pratt, 25 Ill. 25, 34; Quinn v. Roath, 37 Conn. 16, 24; McComas v. Easley, 21 Gratt. 23, 29; Hale v. Wilkinson, 21 Gratt. 75, 80; Cooper v. Pena, 21 Cal. 403, 411; Bruck v. Tucker, 42 Cal. 346, 353; Bogan v. Daughdrill, 51 Ala. 312, 314; Aston v. Robinson, 49 Miss. 348, 351; Daniel v. Frazer, 40 Miss. 507; Weise's Appeal, 72 Pa. St. 351, 354; Snell v. Mitchell, 65 Me. 48, 50; Blackwilder v. Loveless, 21 Ala. 371, 374; Port Clinton R. R. v. Cleveland etc. R. R., 13 Ohio St. 544, 549; Rogers v. Saunders, 16 Me. 92, 97; 33 Am. Dec. 635; Seymour v. Delancey, 6 Johns. Ch. 222, 224; 3 Cow. 445; 15 Am. Dec. 270; Lamare v. Dixon, L. R. 6 H. L. 414, 423; Tilley v. Thomas, L. R. 3 Ch. 61, 72; Mississippi etc. R. R. v. Cromwell, 91 U. S. 643; Eastman v. Plumer,

The term "discretionary" as thus used is, in my opinion, misleading and inaccurate. The remedy of specific performance is governed by the same general rules which control the administration of all other equitable remedies. The right to it depends upon elements, conditions, and incidents, which equity regards as essential to the administration of all its peculiar modes of relief. When all these elements, conditions, and incidents exist, the remedial right is perfect in equity.[2] So far as these essential elements and conditions do not relate to the existence of contracts binding in equity, they are nothing but expressions and applications of the fundamental principles, he who seeks equity must do equity, and he who comes into equity must come with clean hands.

§ 1405. **Essential Elements and Incidents.**—Assuming that a contract has been completely concluded, and that it belongs to a class capable of being enforced, it must still possess certain essential elements and incidents, in order that a court of equity may exercise the jurisdiction to compel its performance. Some of these elements affect its validity; others its equitable character. It must be upon a valuable consideration.[1] It must be reasonably certain

46 N. H. 464; Sharps Rifle M. Co. v. Rowan, 35 Conn. 127; Sherman v. Wright, 49 N. Y. 227; Cuff v. Dorland, 55 Barb. 481; Seaman v. Van Rensselaer, 10 Barb. 81; Plummer v. Keppler, 26 N. J. Eq. 481; Crane v. Decamp, 21 N. J. Eq. 414; Merritt v. Brown, 21 N. J. Eq. 401; Smoot v. Rea, 19 Md. 398; Godwin v. Collins, 4 Houst. 28; Humbard's Heirs v. Humbard's Heirs, 3 Head, 100; Phillips v. Stauch, 20 Mich. 369; Bowman v. Cunningham, 78 Ill. 48; Auter v. Miller, 18 Iowa, 405; St. Paul Division etc. v. Brown, 9 Minn. 157; Burke v. Seely, 46 Mo. 334; Taylor v. Williams, 45 Mo. 80.

2 These elements, conditions, and incidents, as collected from the cases, are the following: The contract must be concluded, certain, unambiguous, mutual, and upon a valuable consideration; it must be perfectly fair in all its parts; free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; not an unconscionable or hard bargain; and its performance not oppressive upon the defendant; and finally, it must be capable of specific execution through a decree of the court.

1 A seal does not, for this purpose, import a valuable consideration: Jefferys v. Jefferys, Craig & P. 138; Ord v. Johnston, 1 Jur., N. S., 1063, 1065; Houghton v. Lees, 1 Jur., N. S., 862, 863; Minturn v. Seymour, 4 Johns. Ch. 497; Burling v. King, 66 Barb. 633; Butman v. Porter, 100 Mass. 337;

as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it was made.[2] It must be, in general, mutual in its obligation and in its remedy.[3] The contract must be free from any fraud, misrepresentation even though not fraudulent, mistake, or illegality.[4] The elements which peculiarly affect the *equitable* character of the agreement and of the remedy are the following: The contract must be perfectly fair, equal,

Vasser v. Vasser, 23 Miss. 378; Estate of Webb, 49 Cal. 541, 545; Murphy v. Rooney, 45 Cal. 78.

[2] Marsh v. Milligan, 3 Jur., N. S., 979; Morrison v. Barrow, 1 De Gex, F. & J. 633; Taylor v. Portington, 7 De Gex, M. & G. 328; Pearce v. Watts, L. R. 20 Eq. 492; Tallman v. Franklin, 14 N. Y. 584; Stanton v. Miller, 58 N. Y. 192; Nichols v. Williams, 22 N. J. Eq. 63; Carr v. Passaic etc. Co., 22 N. J. Eq. 85; 19 N. J. Eq. 424; Potts v. Whitehead, 20 N. J. Eq. 55; Reese v. Reese, 41 Md. 554; Hardesty v. Richardson, 44 Md. 617; 22 Am. Rep. 57; Pierce's Heirs v. Catron's Heirs, 23 Gratt. 588; Allen v. Webb, 64 Ill. 342; Bowman v. Cunningham, 78 Ill. 48; Miller v. Campbell, 52 Ind. 125; Munsell v. Loree, 21 Mich. 491; McClintock v. Laing, 22 Mich. 212; Wright v. Wright, 31 Mich. 380; Tiernan v. Gibney, 24 Wis. 190; Mastin v. Halley, 61 Mo. 196; Long v. Duncan, 10 Kan. 294; Agard v. Valencia, 39 Cal. 292; Odell v. Morin, 5 Or. 96; Lynes v. Hayden, 119 Mass. 482; Hyde v. Cooper, 13 Rich. Eq. 250; McGuire v. Stevens, 42 Miss. 724; 2 Am. Rep. 649; Bell v. Bruen, 1 How. 169; Hopkins v. Roberts, 54 Md. 312; McCornack v. Sage, 87 Ill. 484.

[3] Bromley v. Jefferies, 2 Vern. 415; Rogers v. Saunders, 16 Me. 92; 33 Am. Dec. 635; Duvall v. Myers, 2 Md. Ch. 401; Beard v. Linthicum, 1 Md. Ch. 345; Reese v. Reese, 41 Md. 554; Benedict v. Lynch, 1 Johns. Ch. 370; 7 Am. Dec. 484; German v. Machin, 6 Paige, 288; Meason v. Kaine, 63 Pa. St. 335; Moore's Adm'rs v. Fitz Randolph, 6 Leigh, 175; Flight v. Bolland, 4 Russ. 298; Blanchard v. Detroit etc. R. R., 31 Mich. 43; 18 Am. Rep. 142; Maynard v. Brown, 41 Mich. 298; Hopkins v. Roberts, 54 Md. 312. This doctrine is constantly stated by the courts, but there are so many exceptions, especially with respect to the obligation, that the rule is far from universal: See Green v. Richards, 23 N. J. Eq. 32, 35. It may be said, however, as a general proposition, that where a contract was intended to bind *both* the parties, and for any reason one of them is not bound, he cannot compel performance by the other: Butman v. Porter, 100 Mass. 337; Sullings v. Sullings, 9 Allen, 234. Unilateral contracts, in the form of bonds and the like, are constantly enforced: Ewins v. Gordon, 49 N. H. 444; Jones v. Robbins, 29 Me. 351; 50 Am. Dec. 593; Barnard v. Lee, 97 Mass. 92; Palmer v. Scott, 1 Russ. & M. 391.

[4] The effect of these incidents upon contracts in equity, and upon the remedy of specific performance, has been discussed in the preceding volume. As to parol evidence of mistake, fraud, or surprise, see vol. 2, §§ 857–859; defense of mistake in suits for specific performance: § 860; proof of mistake on plaintiff's part in same suits: §§ 861–863; effect of statute of frauds on the proof of mistake, fraud, or surprise: §§ 864–867.

and just in its terms and in its circumstances.[5] The contract and the situation of the parties must be such that the remedy of specific performance will not be harsh or oppressive.[6] The vendor's title must be free from reasonable

As to misrepresentations as a defense, even when not intentional or with knowledge, see vol. 2, § 889; also § 899. Non-disclosure of facts a defense: § 905; inadequacy of consideration as a defense: §§ 925–928; Ready v. Noakes, 29 N. J. Eq. 497; illegal contracts, in general: §§ 929–936; 937–942.

[5] See *ante*, § 1404. If, then, the contract itself is unfair, onesided, unjust, unconscionable, or affected by any other inequitable feature; or if its enforcement would be oppressive or hard on the defendant, or would prevent his enjoyment of his own rights, or would work any injustice; or if the plaintiff has obtained it by sharp and unscrupulous practices, by overreaching, by trickery, by taking undue advantage of his position, by non-disclosure of material facts, or by any other unconscientious means,—then a specific performance will be refused. It necessarily follows that a *less strong case* is sufficient to *defeat* a suit for a specific performance than is requisite to obtain the remedy: See Vigers v. Pike, 8 Clark & F. 562, 645, per Lord Cottenham. See cases in note under § 1404; Willan v. Willan, 16 Ves. 72, 83; Savage v. Brocksopp, 18 Ves. 335; Twining v. Morrice, 2 Brown Ch. 326; Revell v. Hussey, 2 Ball & B. 280, 288; Willard v. Tayloe, 8 Wall. 557; Marble Co. v. Ripley, 10 Wall. 339; Jackson v. Ashton, 11 Pet. 229; McNeil v. Magee, 5 Mason, 244; Margraf v. Muir, 57 N. Y. 155; Osgood v. Franklin, 2 Johns. Ch. 1, 23; 7 Am. Dec. 513; Minturn v. Seymour, 4 Johns. Ch. 497; St. John v. Benedict, 6 Johns. Ch. 111; Acker v. Phœnix, 4 Paige, 305; Howard v. Moore, 4 Sneed, 317; Bowman v. Cunningham, 78 Ill. 48; Fish v. Leser, 69 Ill. 394. The remedy will therefore be refused when the performance of the contract would work a breach of trust: Harnett v. Yielding, 2 Schoales & L. 548, 553; White v. Cuddon, 8 Clark & F. 766; or work injury to third persons: Thomas v. Dering, 1 Keen, 729; Curran v. Holyoke W. Co., 116 Mass. 90; further examples of the general rule: Shriver v. Seiss, 49 Md. 384; Abbott v. L'Hommedieu, 10 W. Va. 677; White v. McGannon, 29 Gratt. 511; Shaddle v. Disborough, 30 N. J. Eq. 370; Coe v. N. J. Midland R'y, 31 N. J. Eq. 105; Tillotson v. Gesner, 33 N. J. Eq. 313; Chicago etc. R. R. v. Schoeneman, 90 Ill. 258; Tamm v. Lavalle, 92 Ill. 263; Foll's Appeal, 91 Pa. St. 434; 36 Am. Rep. 671; Brake v. Ballou, 19 Kan. 397; Nims v. Vaughn, 40 Mich. 356; Fitzpatrick v. Dorland, 27 Hun, 291; Schuessler v. Hatchett, 58 Ala. 181; Race v. Weston, 86 Ill. 91.

[6] This rule generally operates in favor of defendants; but may be invoked by a plaintiff when a defendant demands the remedy by counterclaim or cross-complaint. The oppression or hardship may result from unconscionable provisions of the contract itself; or it may result from the situation of the parties, unconnected with the terms of the contract or with the circumstances of its negotiation and execution; that is, from external facts or events or circumstances which control or affect the situation of the defendant: See cases cited *ante*, under § 1404; Gould v. Kemp, 2 Mylne & K. 304, 308; Kimberley v. Jennings, 6 Sim. 340; Willard v. Tayloe, 8 Wall. 557;

doubt. In suits by a vendor, the purchaser will not be compelled to complete the contract, unless the title is free from any reasonable doubt.[7] The remaining essential elements and incidents relate more directly to the remedy itself, to the actual performance directed by the decree, and may be briefly stated as follows: The contract must be such that its specific enforcement would not be nugatory.[8] Although

Marble Co. v. Ripley, 10 Wall. 339; Cathcart v. Robinson, 5 Pet. 263; Tobey v. County of Bristol, 3 Story, 800; Margraf v. Muir, 57 N. Y. 155; Clarke v. Rochester etc. R. R., 18 Barb. 350; Weise's Appeal, 72 Pa. St. 351; Cannaday v. Shepard, 2 Jones Eq. 224; Barnett v. Spratt's Adm'r, 4 Ired. Eq. 171; Stone v. Pratt, 25 Ill. 25; Chicago etc. R. R. v. Schoeneman, 90 Ill. 258; Coe v. N. J. Midland R'y, 31 N. J. Eq. 105.

7 This rule should not be misunderstood. It is wholly distinct from the objection that the vendor has no title at all, or has only a partial or defective one,— an objection which may be raised *by either* of the parties, and which, if *proved*, would either totally defeat a specific performance or render it partial. The rule of the text assumes that the question whether the vendor's title is valid or imperfect is not definitely decided by the court. But if there arises, on the pleadings or from the proofs, a reasonable doubt as to the vendor's title, the court, without deciding the question between the parties then before it, regards the doubt as a sufficient reason for not compelling the purchaser to carry out the contract and accept a conveyance. Where the purchaser is plaintiff, he *may* elect to take a defective and partial title: Pyrke v. Waddingham, 10 Hare, 1; Radford v. Willis, L. R. 7 Ch. 7; Alexander v. Mills, L. R. 6 Ch. 124; Beioley v. Carter, L. R. 4 Ch. 230; Collier v. McBean, L. R. 1 Ch. 81; Rede v. Oakes, 4 De Gex, J. & S. 505; Bensel v. Gray, 80 N. Y. 517; Bates v. Delavan, 5 Paige, 299; Seymour v. De Lancey, Hopk. Ch. 436; 14 Am. Dec. 552; Jeffries v. Jeffries, 117 Mass. 184; Sturtevant v. Jaques, 14 Allen, 523; Vreeland v. Blauvelt, 23 N. J. Eq. 483; Dobbs v. Norcross, 24 N. J. Eq. 327; Kostenbader v. Spotts, 80 Pa. St. 430; Pratt v. Eby, 67 Pa. St. 396; Walsh v. Hall, 66 N. C. 233; Allen v. Atkinson, 21 Mich. 351; Powell v. Conant, 33 Mich. 396; Morgan's Heirs v. Morgan, 2 Wheat. 290; Longworth v. Taylor, 1 McLean, 395; Watts v. Waddle, 1 McLean, 200; Jenkins v. Fahey, 73 N. Y. 355; Cornell v. Andrews, 35 N. J. Eq. 7; Mitchell v. Steinmetz, 97 Pa. St. 251; Rader v. Neal, 13 W. Va. 373; Swepson v. Johnston, 84 N. C. 449; Hancock v. Bramlett, 85 N. C. 393; Lyles v. Kirkpatrick, 9 S. C. 265; Chrisman v. Partee, 38 Ark. 31; Hymers v. Branch, 6 Mo. App. 511; Luse v. Deitz, 46 Iowa, 205.

8 The court will not grant the remedy when by the terms of the contract itself the defendant would be entitled at any time to terminate the agreement and thus evade the decree. Illustrations: Partnership agreements will not, unless in some exceptional cases, be thus enforced: Scott v. Rayment, L. R. 7 Eq. 112; Hercy v. Birch, 9 Ves. 357; Sheffield etc. Co. v. Harrison, 17 Beav. 294; England v. Curling, 8 Beav. 129; Tobey v. Co. of

the contract by its terms can be specifically enforced, the defendant must also have the capacity and ability to perform it by obeying the decree of the court.[9] Finally, the contract must be such that the court is able to make an efficient decree for its specific performance, and is able to enforce its own decree when made.[10]

Bristol, 3 Story, 800; Buck v. Smith, 29 Mich. 166; 18 Am. Rep. 84; Meason v. Kaine, 63 Pa. St. 335; Manning v. Wadsworth, 4 Md. 59; Reed v. Vidal, 5 Rich. Eq. 289; and see Rust v. Conrad, 47 Mich. 449; 41 Am. Rep. 720. Nor agreements to submit to arbitration: Price v. Williams, cited 6 Ves. 818; Street v. Rigby, 6 Ves. 815; Tobey v. Co. of Bristol, 3 Story, 800, 820, 823; Noyes v. Marsh, 123 Mass. 286; Conner v. Drake, 1 Ohio St. 166; King v. Howard, 27 Mo. 21.

9 *Total inability.* — If at the time of the inability the defendant is totally unable to perform because he has no title at all, or a title completely defective, the remedy will not be granted. Mere pecuniary inability to pay the price is not, however, such an incapacity as the rule assumes. This incapacity must exist at the time of the hearing. The mere fact that the defendant did not own or possess the subject-matter at the time of making the contract does not of itself constitute the legal impossibility, if he acquired it subsequently, at, or before the hearing: Green v. Smith, 1 Atk. 572; Columbine v. Chichester, 2 Phill. Ch. 27; Hallett v. Middleton, 1 Russ. 243; Greenaway v. Adams, 12 Ves. 395, 401; Phillips v. Stauch, 20 Mich. 369; Burke v. Seely, 46 Mo. 334; Burton v. Shotwell, 13 Bush. 271. The rule applies even when the inability is caused by the defendant's own wrongful act; as where a vendor, after making the contract and before the suit, conveyed the land to a *bona fide* purchaser for value and without notice. A specific performance would be refused, although the court of equity *might* grant a decree for damages: Denton v. Stewart, 1 Cox, 258; Greenaway v. Adams, 12 Ves. 395, 400; Ferguson v. Wilson, L. R. 2 Ch. 77; Smith v. Kelley, 56 Me. 64; Little v. Thurston, 58 Me. 86; Gupton v. Gupton, 47 Mo. 37; Warren v. Richmond, 53 Ill. 52. But if a vendor, after making a contract, should enter into a second agreement to sell the land to B, or should convey it to B, under such circumstances that B is *not* a *bona fide* purchaser, etc., then the prior vendee can compel a specific performance against the vendor and B: Snowman v. Harford, 57 Me. 397; Fullerton v. McCurdy, 4 Lans. 132; Haughwout v. Murphy, 22 N. J. Eq. 531; 21 N. J. Eq. 118; Cole v. Cole, 41 Md. 301; Bryant v. Booze, 55 Ga. 438; Johnson v. Bowden, 37 Tex. 621; Bird v. Hall, 30 Mich. 374; Youell v. Allen, 18 Mich. 107; Gregg v. Hamilton, 12 Kan. 333.

Partial incapacity. — Where the defendant's title fails as to a part of the subject-matter, or is partially defective, the plaintiff *may* elect and be entitled to a specific enforcement of the contract, so far as it can be enforced; and *may* claim and receive compensation for the deficiency: See cases cited *post*, under § 1407.

10 Although the contract is valid, and the defendant is able to do what he has undertaken to do, if, through the want of appropriate means and instru-

§ 1406. Rights under the Contract — Effect of Events without the Agency of the Parties.— The effect of an executory contract for the sale of land, in working an equitable conversion, and in clothing the purchaser with an equitable estate in the land, and the vendor with an equitable owner-

mentalities, the court is unable, while pursuing its ordinary modes of administering justice, either to render a decree or to enforce the decree when made, then the remedy will be refused. *Cases where the court cannot render a decree:* The following species of contracts will not be thus enforced: Agreements concerning the manufacture and sale of secret medicines and other secret commodities, where the contract recognizes the secret as not to be disclosed: Newbery v. James, 2 Mer. 446; Williams v. Williams, 3 Mer. 157. Contracts for the sale or transfer of a good-will, separate from or unconnected with the business and premises of which it is an incident: Bozon v. Farlow, 1 Mer. 459; Baxter v. Conolly, 1 Jacob & W. 576; Coslake v. Till, 1 Russ. 376. But where the good-will is sold and transferred, *together with* the business and premises, the agreement may be directly enforced, or negatively enforced by an injunction: Darbey v. Whitaker, 4 Drew. 134, 139, 140; Chissum v. Dewes, 5 Russ. 29; Whittaker v. Howe, 3 Beav. 383; and see cases cited in note under § 1344. *Cases where the court cannot enforce its decree:* This class includes the following species of contracts, for which the equitable remedy is refused. *Continuing* covenants: Collins v. Plumb, 16 Ves. 454; City of London v. Nash, 3 Atk. 512, 515; Caswell v. Gibbs, 33 Mich. 331. Contracts for sale at a price to be fixed by valuers: Milnes v. Gery, 14 Ves. 400; Wilks v. Davis, 3 Mer. 507; Collins v. Collins, 26 Beav. 306; Vickers v. Vickers, L. R. 4 Eq. 529; Richardson v. Smith, L. R. 5 Ch. 648; Earl of Darnley v. London etc. R'y, 3 De Gex, J. & S. 24; L. R. 2 H. L. 43; Hopkins v. Gilman, 22 Wis. 476; for limitations of the rule, see Dinham v. Bradford, L. R. 5 Ch. 519; Smith v. Peters, L. R. 20 Eq. 511; Jackson v. Jackson, 1 Smale & G. 184. Contracts for personal services, where the full performance rests upon the personal *will* of the contracting party: Palmer v. Scott, 1 Russ. & M. 391; Mair v. Himalaya Tea Co., L. R. 1 Eq. 411; Marble Co. v. Ripley, 10 Wall. 339; Ford v. Jermon, 6 Phila. 6; Cooper v. Pena, 21 Cal. 403, 411; Randall v. Latham, 36 Conn. 48; Richmond v. Dubuque etc. R. R., 33 Iowa, 422; De Rivafinoli v. Corsetti, 4 Paige, 264; 25 Am. Dec. 532; Hamblin v. Dinneford, 2 Edw. Ch. 529; Haight v. Badgeley, 15 Barb. 499. How far and when such contracts may be negatively enforced by injunction has been considered *ante*, in § 1343. Contracts whose performance would be continuous, and would require protracted supervision and direction; e. g., contracts for building; for construction of works, railroads, and the like; for working mines, quarries, etc.: See *ante*, § 1402, and cases in the note. The English decisions on this subject are very numerous. The following are a few illustrations of American decisions: Beck v. Allison, 56 N. Y. 366; 15 Am. Rep. 430; Mastin v. Halley, 61 Mo. 196; Randall v. Latham, 36 Conn. 48; Starnes v. Newsom, 1 Tenn. Ch. 239; Columbia W. Co. v. Columbia, 5 S. C. 225; Atlanta etc. R. R. v. Speer, 32 Ga. 550; 79 Am. Dec. 305; Cincinnati etc.

ship of the purchase price, has already been described.[1] As soon as the contract is finally *concluded,* although it is wholly executory in form, these rights and estates become fixed and vested. It follows, therefore, that the purchaser, being the equitable owner, is entitled to all the benefits and assumes all the risks of ownership.[2]

§ 1407. Performance by Plaintiff a Condition Precedent.—The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms.[1] With respect to the necessity of an actual

R. R. v. Washburn, 25 Ind. 259; Columbus etc. R. R. v. Watson, 26 Ind. 50; Gregory v. Ingwersen, 32 N. J. Eq. 199; Danforth v. Philadelphia etc. R'y, 30 N. J. Eq. 12; Wharton v. Stoutenburgh, 35 N. J. Eq. 266; Roberts v. Kelsey, 38 Mich. 602. The tendency of the recent cases, especially in England, is to narrow and limit the operation of this rule.

§ 1406, [1] See *ante,* §§ 368, 372, 1161; Coman v. Lakey, 80 N. Y. 345, 350; Pelton v. Westchester F. Ins. Co., 77 N. Y. 605, 607.

§ 1406, [2] From that time he takes the benefit of all *subsequent* improvements, increases, gains, rises in value, and other advantages happening to the property. Conversely, the subject-matter is at his risk, and he must bear all total or partial losses, from fire or other accidental cause, or from trespassers, and all depreciations in value, and other disadvantages; *res perit domino.* This *liability* is, however, subject to the important limitation that the loss or depreciation does not arise from the neglect, default, or unwarrantable delay of the vendor in carrying out the contract: Paine v. Meller, 6 Ves. 349; Cass v. Rudele, 2 Vern. 280; Mortimer v. Capper, 1 Brown Ch. 156; Jackson v. Lever, 3 Brown Ch. 605; Richter v. Selin, 8 Serg. & R. 425, 440; Brewer v. Herbert, 30 Md. 301; 96 Am. Dec. 582; Robb v. Mann, 11 Pa. St. 300; 51 Am. Dec. 551; Andrews v. Bell, 56 Pa. St. 343; Lee v. Kirby, 104 Mass. 420, 428; Ewing v. Beauchamp, 6 B. Mon. 422; Cooper v. Pena, 21 Cal. 403; Willard v. Tayloe, 8 Wall. 558, 571; Marble Co. v. Ripley, 10 Wall. 339; Hale v. Wilkinson, 21 Gratt. 75; Ambrouse's Heirs v. Keller, 22 Gratt. 769. Vendor's delay or default: Wyvill v. Bishop of Exeter, 1 Price, 292; Paine v. Meller, 6 Ves. 349; Christian v. Cabell, 22 Gratt. 82; Griffin's Ex'r v. Cunningham, 19 Gratt. 571; Booten v. Scheffer, 21 Gratt. 474; Merritt v. Brown, 19 N. J. Eq. 286; Kirby v. Harrison, 2 Ohio St. 326; 59 Am. Dec. 677.

§ 1407, [1] In the language often used, he must show himself "ready, willing,

tender and a demand of performance before suit brought, the American decisions are somewhat conflicting, and differ-

desirous, prompt, and eager." There are two *apparent* exceptions, depending upon strictly equitable considerations: 1. A strict performance at the very stipulated *time* is not always necessary; and 2. Partial and immaterial failures of title or defects of the subject-matter, if admitting of compensation, *may* not prevent the vendor from enforcing the remainder of the agreement: Lloyd v. Collett, 4 Brown Ch. 469; 4 Ves. 690, note; Harrington v. Wheeler, 4 Ves. 686; Guest v. Homfray, 5 Ves. 818; Walker v. Jeffreys, 1 Hare, 341, 352; Southcomb v. Bishop of Exeter, 6 Hare, 213, 218; Dorin v. Harvey, 15 Sim. 49; Sharp v. Wright, 28 Beav. 150; Earl of Darnley v. London etc. R'y, 3 De Gex, J. & S. 24; McMurray v. Spicer, L. R. 5 Eq. 527, 537; Colson v. Thompson, 2 Wheat. 336; Watts v. Waddle, 6 Pet. 389; Boone v. Mo. Iron Co., 17 How. 340; McNeil v. Magee, 5 Mason, 244; Longworth v. Taylor, 1 McLean, 395; Sullings v. Sullings, 9 Allen, 234; Wood v. Perry, 1 Barb. 114; Burling v. King, 66 Barb. 633; Van Campen v. Knight, 63 Barb. 205; Reeves v. Kimball, 40 N. Y. 299; King v. Ruckman, 21 N. J. Eq. 599; Thorp v. Pettit, 16 N. J. Eq. 488; Crane v. Decamp, 21 N. J. Eq. 414; Merritt v. Brown, 21 N. J. Eq. 401; Earl v. Halsey, 14 Pa. St. 332; Buchanan v. Lorman, 3 Gill, 51, 77; McComas v. Easley, 21 Gratt. 23; Vail v. Nelson, 4 Rand. 478; Blackmer v. Phillips, 67 N. C. 340; Secrest v. McKenna, 1 Strob. Eq. 356; Brown v. Hayes, 33 Ga. Supp. 136; Tyler v. McCardle, 9 Smedes & M. 230; Richardson v. Linney, 7 B. Mon. 571; O'Kane v. Kiser, 25 Ind. 168; Allen v. Atkinson, 21 Mich. 351; Rogers v. Taylor, 40 Iowa, 193; Wass v. Mugridge, 128 Mass. 394; Jenkins v. Harrison, 66 Ala. 345; Selleck v. Tallman, 87 N. Y. 106; McHugh v. Wells, 39 Mich. 175; Russell v. Nester, 46 Mich. 290; Ludlum v. Buckingham, 35 N. J. Eq. 71; Kinney v. Redden, 2 Del. Ch. 46.

Vendor's failure of title.— It is therefore a familiar rule that the vendor cannot force performance upon the purchaser, unless he is able to give a good title to the subject-matter: King v. Knapp, 59 N. Y. 462; Hepburn v. Auld, 5 Cranch, 262; Hoover v. Calhoun, 16 Gratt. 109; Jackson v. Ligon, 3 Leigh, 160; Bryan v. Read, 1 Dev. & B. Eq. 78; Cunningham v. Sharp, 11 Humph. 116, 121; Jeffries v. Jeffries, 117 Mass. 184; Dobbs v. Norcross, 24 N. J. Eq. 327; Vreeland v. Blauvelt, 23 N. J. Eq. 483; Cornell v. Andrews, 35 N. J. Eq. 7; Jenkins v. Fahey, 73 N. Y. 355; Bensel v. Gray, 80 N. Y. 517; Swepson v. Johnston, 84 N. C. 449; Hancock v. Bramlett, 85 N. C. 393; Lyles v. Kirkpatrick, 9 S. C. 265; Rader v. Neal, 13 W. Va. 373; Hymers v. Branch, 6 Mo. App. 511; Chrisman v. Partee, 38 Ark. 31; Mitchell v. Steinmetz, 97 Pa. St. 251.

His partial defect or failure.— But where the defect or failure is partial and immaterial, so that he can give substantially what he contracted to give, the court may grant the remedy, with compensation to the purchaser: Halsey v. Grant, 13 Ves. 73, 77; Guest v. Homfray, 5 Ves. 818; Mortlock v. Buller, 10 Ves. 292, 306; McQueen v. Farquhar, 11 Ves. 467; Foley v. Crow, 37 Md. 51; but the defect or failure must be *immaterial:* Peers v. Lambert, 7 Beav. 546; Howard v. Kimball, 65 N. C. 175; 6 Am. Rep. 739; Griffin's Ex'r v. Cunningham, 19 Gratt. 571; Smith v. Turner, 50 Ind. 367; Havens v. Bliss, 26 N. J. Eq. 363; Gregory v. Perkins, 40 Iowa, 82; Walsh v. Barton, 24 Ohio St. 28; Bogan v. Daughdrill, 51 Ala. 312.

ent rules seem to prevail in different states. The most important of these rules are given in the foot-note.

Tender, when necessary.— In general, the rules of equity concerning the necessity of an *actual* tender are not so stringent as those of the law. The following special rules seem to be settled: 1. An actual tender by the plaintiff is unnecessary when, from the acts of the defendant or from the situation of the property it would be wholly nugatory. Thus if defendant has openly refused to perform, the plaintiff need not make a tender or demand; it is enough that he is ready and willing, and offers to perform in his pleading: Hunter v. Daniel, 4 Hare, 420, 433; Mattocks v. Young, 66 Me. 459, 467; Crary v. Smith, 2 N. Y. 60, 65; Kerr v. Purdy, 50 Barb. 24; Maxwell v. Pittenger, 3 N. J. Eq. 156; White v. Dobson, 17 Gratt. 262; Brock v. Hidy, 13 Ohio St. 306, 310; Brown v. Eaton, 21 Minn. 409, 411; Gill v. Newell, 13 Minn. 462, 472; Deichmann v. Deichmann, 49 Mo. 107; Gray v. Dougherty, 25 Cal. 266, 280, 281. Also, if at the time fixed the vendor is unable to convey, by reason of a defect in his title, etc.: Karker v. Haverly, 50 Barb. 79; Delavan v. Duncan, 49 N. Y. 485, 487; Hall v. Whittier, 10 R. I. 530; Young v. Daniels, 2 Iowa, 126; 63 Am. Dec. 477; Gray v. Dougherty, 25 Cal. 266, 280; unless time was made essential: Kimball v. Tooke, 70 Ill. 553. 2. Where the stipulations are mutual and dependent,— that is, where the deed is to be delivered upon payment of the price,— an actual tender and demand by one party is necessary to put the other in default, and to cut off *his* right to treat the contract as still subsisting: Hubbell v. Von Schoening, 49 N. Y. 326, 331; Leaird v. Smith, 44 N. Y. 618; Van Campen v. Knight, 63 Barb. 205; Irvin v. Bleakley, 67 Pa. St. 24, 28; Crabtree v. Levings, 53 Ill. 526. 3. *Time essential:* Where the time of payment by the vendee is made *essential,* and *a fortiori* where, if his payments are not made on the exact day named, the vendor may treat the contract as at an end, the vendee must make an actual tender of the price and a demand of the deed at a specified time. The same is true of the vendor when the time of conveying is made essential. This is the very meaning of time being of the essence of the contract: Duffy v. O'Donovan, 46 N. Y. 223; Gale v. Archer, 42 Barb. 320; Wells v. Smith, 2 Edw. Ch. 78; Kimball v. Tooke, 70 Ill. 553; Phelps v. Illinois Cent. R. R., 63 Ill. 468; Heuer v. Rutkowski, 18 Mo. 216; but the necessity may be waived by conduct of the other party: Duffy v. O'Donovan; Kimball v. Tooke, *supra;* Tobey v. Foreman, 79 Ill. 489. *Time not essential:* Concerning the necessity of actual tender in contracts in which time is not essential, the American decisions are directly conflicting. According to one group of cases, the strict legal rule is enforced. Where the stipulations are mutually dependent, the plaintiff must make an actual tender, and must demand performance before bringing his suit. Some of these cases, however, dispense with the demand, and only require a tender. *Suits by the vendee:* Klyce v. Broyles, 37 Miss. 524; Mhoon v. Wilkerson, 47 Miss. 633; Gray v. Dougherty, 25 Cal. 266, 278, 282; Jones v. Petaluma, 36 Cal. 230, 232; Marshall v. Caldwell, 41 Cal. 611, 615; Duff v. Fisher, 15 Cal. 375, 381; Mather v. Scoles, 35 Ind. 1; Fall v. Hazelrigg, 45 Ind. 576; 15 Am. Rep. 278; Lynch v. Jennings, 43 Ind. 276, 286; Hart v. McClellan, 41 Ala. 251; Bell v. Thompson, 34 Ala. 633; Deichmann v. Deichmann, 49 Mo. 107; Brock v. Hidy, 13 Ohio St. 306, 310; Rogers v. Taylor, 40

§ 1408. Time as Affecting the Right to a Performance.— The stipulations concerning time of performance in a contract are regarded by equity either as immaterial, or as essential, or as material. In all ordinary cases of contract, equity does not regard time as of the essence of the agreement. In all ordinary cases of contract for the sale of land, if there is nothing special in its objects, subject-matter, or terms, although a certain period of time is stipulated for its completion, or for the execution of any of its terms, equity treats the provision as formal rather than essential, and permits a party who has suffered the period to elapse to perform such acts after the prescribed date, and to compel a performance by the other party notwithstanding his own delay.[1] *Time essential:* Time may be essential. It is

Iowa, 193; Bearden v. Wood, 1 A. K. Marsh. 450; Hall v. Whittier, 10 R. I. 530. *Suits by vendor:* Klyce v. Broyles, 37 Miss. 524; Ex parte Hodges, 24 Ark. 197; Corbas v. Teed, 69 Ill. 205; and see Thomson v. Smith, 63 N. Y. 301. Another group of decisions adopts a rule more in accordance with the principles of equity, viz., that in such contracts an actual tender or demand by the plaintiff prior to the suit is not essential. It is enough that he was ready and willing, and offered, at the time specified, and even that he is ready and willing at the time of bringing the suit, unless his rights have been lost by laches, and that he offers to perform in his pleading. The plaintiff's performance will be provided for in the decree, and his previous neglect will only affect his right to costs. *Suits by vendee:* Irvin v. Gregory, 13 Gray, 215, 218; Park v. Johnson, 4 Allen, 259; Stevenson v. Maxwell, 2 N. Y. 408, 415; Bruce v. Tilson, 25 N. Y. 194, 197, 203 (see comments of Allen, J., upon Wells v. Smith, 2 Edw. Ch. 78; 7 Paige, 22; 31 Am. Dec. 274; confining it to contracts in which time is made essential); Freeson v. Bissell, 63 N. Y. 168, 170; Chess's Appeal, 4 Pa. St. 52; 45 Am. Dec. 668; Smoot v. Rea, 19 Md. 398, 410; Maughlin v. Perry, 35 Md. 352; Morris v. Hoyt, 11 Mich. 9, 18; Seeley v. Howard, 13 Wis. 336; St. Paul Division etc. v. Brown, 9 Minn. 157. *Suits by vendor:* Stevenson v. Maxwell, Bruce v. Tilson, Freeson v. Bissell, *supra;* Hawk v. Greensweig, 2 Pa. St. 295; Winton v. Sherman, 20 Iowa, 295; Seeley v. Howard, 13 Wis. 336; Woodson's Adm'rs v. Scott, 1 Dana, 470. This is unquestionably the true *equitable* doctrine. For further illustrations, see Wass v. Mugridge, 128 Mass. 394; Selleck v. Tallman, 87 N. Y. 106; Jenkins v. Harrison, 66 Ala. 345; McHugh v. Wells, 39 Mich. 175.

[1] This general doctrine is established by an unbroken line of decisions; but it is subject to various exceptions and limitations, one of the most important being that the delay must not be willful and intentional, and must not have worked any harm to the other party. My limits do not permit me to enter upon a full discussion of these questions; for their solution the reader must be referred to special works on this subject: Seton v. Slade, 7 Ves. 265, per

so whenever the intention of the parties is clear that the performance of its terms shall be accomplished exactly at the stipulated day. The intention must then govern. A delay cannot be excused. A performance at the time is essential; any default will defeat the right to a specific enforcement.[2] *Time material:* Although time is not ordi-

Lord Eldon; Decamp v. Feay, 5 Serg. & R. 323; 9 Am. Dec. 372; per Gibson, J.; Vyse v. Foster, L. R. 7 H. L. 318; McMurray v. Spicer, L. R. 5 Eq. 527; Tilley v. Thomas, L. R. 3 Ch. 61, 67, 69; Parkin v. Thorold, 2 Sim., N. S., 1; 16 Beav. 59; Hull v. Sturdivant, 46 Me. 34; Dresel v. Jordan, 104 Mass. 407; Quinn v. Roath, 37 Conn. 16; Edgerton v. Peckham, 11 Paige, 352; Hubbell v. Von Schoening, 49 N. Y. 326; Van Campen v. Knight, 63 Barb. 205; Sharp v. Trimmer, 24 N. J. Eq. 422; King v. Ruckman, 20 N. J. Eq. 316; Smoot v. Rea, 19 Md. 399; Scarlett v. Stein, 40 Md. 512; Brock v. Hidy, 13 Ohio St. 305; Keller v. Fisher, 7 Ind. 718; Shafer v. Niver, 9 Mich. 253; Snyder v. Spaulding, 57 Ill. 480; Spalding v. Alexander, 6 Bush, 160; Walton v. Wilson, 30 Miss. 576; Morgan v. Bergen, 3 Neb. 209; Prince v. Griffin, 27 Iowa, 514; Knott v. Stephens, 5 Or. 235; Steele v. Branch, 40 Cal. 3. A delay in payment at the day appointed, unless intentional and willful, or unreasonably long, will not preclude the vendee from enforcing the contract. Of course, the delay must be explained and accounted for, and it must not be prejudicial to the other party beyond the means of reparation: See Longworth v. Taylor, 1 McLean, 395; 14 Pet. 172, per Story, J., and cases cited; Moote v. Scriven, 33 Mich. 500; Brassell v. McLemore, 50 Ala. 476; Sharp v. Trimmer, 24 N. J. Eq. 422; Pritchard v. Todd, 38 Conn. 413; Converse v. Blumrich, 14 Mich. 109, 114; 90 Am. Dec. 230; Shortall v. Mitchell, 57 Ill. 161; Decamp v. Feay, 5 Serg. & R. 323, 327; 9 Am. Dec. 372; Edgerton v. Peckham, 11 Paige, 352, 359; McClartey v. Gokey, 31 Iowa, 505; and see further, in this connection, Grey v Tubbs, 43 Cal. 359; Snider v. Lehnherr, 5 Or. 385; Peck v. Brighton Co., 69 Ill. 200; Beach v. Dyer, 93 Ill. 295; Tilton v. Stein, 87 Ill. 122; Jones v. Jones, 11 Phila. 559; Russell v. Baughman, 94 Pa. St. 400; Parsons v. Gilbert, 45 Iowa, 33; Chadwell v. Winston, 3 Tenn. Ch. 110; Henderson v. Hicks, 58 Cal. 364; Burton v. Adkins, 2 Del. Ch. 125; Davison v. Jersey Co. Ass'n, 71 N. Y. 333; Wonson v. Fenno, 129 Mass. 405.

[2] Hipwell v. Knight, 1 Younge & C. 401; Quinn v. Roath, 37 Conn. 16; Miller's Adm'r v. Miller, 25 N. J. Eq. 354; King v. Ruckman, 20 N. J. Eq. 316; Prince v. Griffin, 27 Iowa, 514; Knott v. Stephens, 5 Or. 235; Grey v. Tubbs, 43 Cal. 359. Time may become essential from the subject-matter, or object of the contract; e. g., where the value of the subject-matter *necessarily* fluctuates and changes with the mere lapse of time: Hipwell v. Knight, 1 Younge & C. 401, 416; Doloret v. Rothschild, 1 Sim. & St. 590 (stocks); see McKay v. Carrington, 1 McLean, 50; Holt v. Rogers, 8 Pet. 420; Brashier v. Gratz, 6 Wheat. 528; Hepburn v. Auld, 5 Cranch, 262; Jennisons v. Leonard, 21 Wall. 302; Jones v. Robbins, 29 Me. 351; 50 Am. Dec. 593; Goldsmith v. Guild, 10 Allen, 239; Hoyt v. Tuxbury, 70 Ill. 331. Also in unilateral contracts: Brooke v. Garrod, 3 Kay & J. 608; 2 De Gex & J. 62; Austin v

narily essential, yet it is, as a general rule, material. In order that a default may not defeat a party's remedy, the delay which occasioned it must be explained and accounted for. The doctrine is fundamental that a party seeking the remedy of specific performance, and also the party who desires to maintain an objection founded upon the other's laches, must show himself to have been "ready, desirous, prompt, and eager."[3]

Tawney, L. R. 2 Ch. 143; Kerr v. Purdy, 51 N. Y. 629; 50 Barb. 24; Karker v. Haverly, 50 Barb. 79; Potts v. Whitehead, 20 N. J. Eq. 55; Fessler's Appeal, 75 Pa. St. 483; Maughlin v. Perry, 35 Md. 352, 360; White v. Dobson, 17 Gratt. 262; Jones v. Noble, 3 Bush, 694; Mason v. Payne, 47 Mo. 517; Estes v. Furlong, 59 Ill. 298, 300. Time may be made essential by express stipulation. No particular form is necessary, but any clause will have the effect which clearly provides that the contract is to be null, if the fulfillment is not within the prescribed time: Hudson v. Bartram, 3 Madd. 440; Benedict v. Lynch, 1 Johns. Ch. 370; 7 Am. Dec. 484; Wells v. Smith, 2 Edw. Ch. 78; 7 Paige, 22; 31 Am. Dec. 274; Barnard v. Lee, 97 Mass. 92; Goldsmith v. Guild, 10 Allen, 239; Quinn v. Roath, 37 Conn. 16; Baldwin v. Van Vorst, 9 N. J. Eq. 577; Bullock v. Adams's Ex'rs, 20 N. J. Eq. 367, 371; Reed v. Breeden, 61 Pa. St. 460; Jackson v. Ligon, 3 Leigh, 160, 187; Kirby v. Harrison, 2 Ohio St. 326, 332; 59 Am. Dec. 677; Scott v. Fields, 7 Ohio, 424; Phelps v. Ill. Cent. R. R., 63 Ill. 468; Peck v. Brighton Co., 69 Ill. 200; Kimball v. Tooke, 70 Ill. 553; Davis v. Stevens, 3 Iowa, 158; O'Fallon v. Kennerly, 45 Mo. 124; Morgan v. Bergen, 3 Neb. 209; Snider v. Lehnherr, 5 Or. 385; Grey v. Tubbs, 43 Cal. 359. Time may also be made essential, where one of the parties delays in fulfilling, and the other party by a notice prescribes a period within which the contract must be completed, or else be abandoned: Reynolds v. Nelson, 6 Madd. 18; Eads v. Williams, 4 De Gex, M. & G. 674; Rogers v. Saunders, 16 Me. 92; 33 Am. Dec. 635; Wiswall v. McGowan, Hoff. Ch. 125; Thompson v. Dulles, 5 Rich. Eq. 370; Smith v. Lawrence, 15 Mich. 499; Reed v. Breeden, 61 Pa. St. 460.

[3] The following are a few out of the great number of cases illustrating this doctrine: Lloyd v. Collett, 4 Brown Ch. 469; Alley v. Deschamps, 13 Ves. 225; McMurray v. Spicer, L. R. 5 Eq. 527, 537; Hubbell v. Von Schoening, 58 Barb. 498; 49 N. Y. 326; Eppinger v McGreal, 31 Tex. 147; Campbell v. Hicks, 19 Ohio St. 433; Mix v. Balduc, 78 Ill. 215; Peck v. Brighton Co., 69 Ill. 200; McDermid v. McGregor, 21 Minn. 111; Ritson v. Dodge, 33 Mich. 463; Delavan v. Duncan, 49 N. Y. 485; Finch v. Parker, 49 N. Y. 1; Hawley v. Jelly, 25 Mich. 94; McLaurie v. Barnes, 72 Ill. 73; Roby v. Cossitt, 78 Ill. 638; Green v. Covillaud, 10 Cal. 317; 70 Am. Dec. 725; Steele v. Branch, 40 Cal. 3; Williams v. Hart, 116 Mass. 513; Boyd v. Schlessinger, 59 N. Y. 301, 305; Davison v. Jersey Co. Ass'n, 6 Hun, 470; 71 N. Y. 333; Ludlum v. Buckingham, 35 N. J. Eq. 71; Kinney v. Redden, 2 Del. Ch. 46; Russell v. Nester, 46 Mich. 290; Beach v. Dyer, 93 Ill. 295; Tilton v. Stein, 87 Ill. 122; Parsons v. Gilbert, 45 Iowa, 33; Chadwell v. Winston, 3 Tenn. Ch. 110; Henderson

§ 1409. Enforcement of Verbal Contracts Part Performed.— The doctrine was settled at an early day in England, and has been fully adopted in nearly all the American states, that a verbal contract for the sale or leasing of land, or for a settlement made upon consideration of marriage, if part performed by the party seeking the remedy, may be specifically enforced by courts of equity, notwithstanding the statute of frauds.[1] The ground upon which the remedy in

v. Hicks, 58 Cal. 364; Burton v. Adkins, 2 Del. Ch. 125; Wonson v. Fenno, 129 Mass. 405; Russell v. Baughman, 94 Pa. St. 400; Jones v. Jones, 11 Phila. 559.

[1] The contract must possess all the elements and features necessary to the specific enforcement of any agreement, except the written memorandum required by the statute. My limits only permit me to state the most general rules on this subject. Out of the vast number of decisions, I shall cite only a comparatively few, by way of illustration: Lester v. Foxcroft, Colles, 108; cited 2 Vern. 456; 1 Lead. Cas. Eq., 4th Am. ed., 1027, 1038, 1042; Clinan v. Cooke, 1 Schoales & L. 22; Newton v. Swazey, 8 N. H. 9; Tilton v. Tilton, 9 N. H. 385; Eaton v. Whitaker, 18 Conn. 222; 44 Am. Dec. 586; Hall v. Whittier, 10 R. I. 530; Freeman v. Freeman, 43 N. Y. 34; 3 Am. Rep. 657; Welsh v. Bayaud, 21 N. J. Eq. 186; Greenlee v. Greenlee, 22 Pa. St. 225; Cole v. Cole, 41 Md. 301; Semmes v. Worthington, 38 Md. 298; Pierce's Heirs v. Catron's Heirs, 23 Gratt. 483; Lowry v. Buffington, 6 W. Va. 249; Church of the Advent v. Farrow, 7 Rich. Eq. 378; Ford v. Finney, 35 Ga. 258; Johnson v. Bowden, 37 Tex. 621; Farrar v. Patton, 20 Mo. 81; Feusier v. Sneath, 3 Nev. 120; Morgan v. Bergen, 3 Neb. 209; Gregg v. Hamilton, 12 Kan. 333; Northrop v. Boone, 66 Ill. 368; Fall v. Hazelrigg, 45 Ind. 576; 15 Am. Rep. 278; Grant v. Ramsey, 7 Ohio St. 157; Armes v. Bigelow, 3 McAr. 442; Hiatt v. Williams, 72 Mo. 214; 37 Am. Rep. 438; Bohanan v. Bohanan, 96 Ill. 591; McDowell v. Lucas, 97 Ill. 489; Jefferson v. Jefferson, 96 Ill. 551; Marshall v. Peck, 91 Ill. 187; Laird v. Allen, 82 Ill. 43; Wallace v. Rappleye, 103 Ill. 229; Littlefield v. Littlefield, 51 Wis. 23; Seaman v. Aschermann, 51 Wis. 678; 37 Am. Rep. 849; Manly v. Howlett, 55 Cal. 94; Hanlon v. Wilson, 10 Neb. 138; Hibbert v. Aylott, 52 Tex. 530; Judy v. Gilbert, 77 Ind. 96; 40 Am. Rep. 289; Lamb v. Hinman, 46 Mich. 112; Jamison v. Dimock, 95 Pa. St. 52; Newkumet v. Kraft, 10 Phila. 127; Wharton v. Stoutenburgh, 35 N. J. Eq. 266; Sherman v. Scott, 27 Hun, 331; Barnes v. Boston etc. R. R., 130 Mass. 388. In a very few states the remedy seems to be either wholly denied, or else admitted only under very special circumstances: North Carolina, Tennessee, Kentucky; while in Massachusetts and Maine, it did not exist until the very recent legislation.

Fundamental ground of the jurisdiction.— The ground is equitable fraud; not an antecedent fraud in entering into the contract, but a fraud inhering in the consequence of setting up the statute as a defense. If the defendant knowingly permits the plaintiff to do acts in part performance of the verbal agreement, acts done in reliance on the agreement, which change the rela-

such cases rests is that of equitable fraud. It would be a virtual fraud for the defendant, after permitting the acts of part performance, to interpose the statute as a bar to the plaintiff's remedial right. The acts of part performance, therefore, in order to satisfy this principle, must be done in pursuance of the contract, and must alter the relations of the parties. The most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements, and these two combined.

tions of the parties and prevent a restoration to their former condition, it would be a virtual fraud for the defendant to interpose the statute as a defense, and thus to secure for himself the benefit of the acts of part performance, while the plaintiff would be left not only without adequate remedy at law, but also liable for damages as a trespasser: See vol. 2, §§ 864–867, 921, where this principle is discussed. See also Lester v. Foxcroft, *supra;* McCormick v. Gregan, L. R. 4 H. L. 82, 97; Haigh v. Kaye, L. R. 7 Ch. 469; Caton v. Caton, L. R. 1 Ch. 137, 147; Bond v. Hopkins, 1 Schoales & L. 413, 433; Clinan v. Cooke, 1 Schoales & L. 22, 41; Mundy v. Jolliffe, 5 Mylne & C. 167, 177; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273; Wright v. Pucket, 22 Gratt. 370, 374; Pierce's Heirs v. Catron's Heirs, 23 Gratt. 588; Semmes v. Worthington, 38 Md. 298; Horn v. Ludington, 32 Wis. 73; Morgan v. Bergen, 3 Neb. 209; and cases cited above, in this note. It follows from this principle that the acts of part performance must be done by the party seeking to enforce the contract; and must be done in pursuance of the contract, and with the design of carrying the same into execution; and must be done with the consent, express or implied, or knowledge, of the other party: Id.

Acts of part performance.— The following acts do *not* constitute a part performance within the doctrine: Acts done prior to the contract; acts merely preparatory or ancillary to the agreement, such as delivering abstract of title, measuring the land, drawing up deeds, etc.; marriage alone; payment of the price in whole or in part (otherwise in Iowa, by statute). The important acts which *do* constitute a sufficient part performance are actual, open *possession* of the land; or permanent and valuable *improvements* made on the land; or these two combined. In addition to the cases cited at the commencement of this note, see *Possession:* Pain v. Coombs, 1 De Gex & J. 34; Shillibeer v. Jarvis, 8 De Gex, M. & G. 79; Coles v. Pilkington, L. R. 19 Eq. 174; Clinan v. Cooke, 1 Schoales & L. 22; Gregory v. Mighell, 18 Ves. 328; Tilton v. Tilton, 9 N. H. 385, 390; Malins v. Brown, 4 N. Y. 403; Reed v. Reed, 12 Pa. St. 117; Danforth v. Laney, 28 Ala. 274; Catlett v. Bacon, 33 Miss. 269; White v. Watkins, 23 Mo. 423; Anderson v. Simpson, 21 Iowa, 399. *Improvements:* Wills v. Stradling, 3 Ves. 378; Stockley v. Stockley, 1 Ves. & B. 23; Mundy v. Jolliffe, 5 Mylne & C. 167; Surcome v. Penniger, 3 De Gex, M. & G. 571; Crook v. Corpor. of Seaford, L. R. 6 Ch. 551; 10 Eq. 678; Williams v. Evans, L. R. 19 Eq. 547; Miller v. Tobie, 41 N. H. 84; Potter v. Jacobs, 111 Mass. 32; Freeman v. Freeman, 43 N. Y. 34; 3 Am. Rep.

§ 1410. Damages in Place of a Specific Performance.—When the impossibility of a specific performance is disclosed at the hearing, and the suit was brought by the plaintiff in ignorance of such fact, the court will award the remedy of damages.[1]

657; Cagger v. Lansing, 43 N. Y. 550; Adams v. Fullam, 43 Vt. 592; Peckham v. Barker, 8 R. I. 17; Green v. Finin, 35 Conn. 178; Mims v. Lockett, 33 Ga. 9; Wimberly v. Bryan, 55 Ga. 198; Sackett v. Spencer, 65 Pa. St. 89; Moss v. Culver, 64 Pa. St. 414; 3 Am. Rep. 601; Ingles v. Patterson, 36 Wis. 373; Gregg v. Hamilton, 12 Kan. 333; Poland v. O'Conner, 1 Neb. 50; 93 Am. Dec. 327; Hoffman v. Fett, 39 Cal. 109; McCarger v. Rood, 47 Cal. 138; Neale v. Neale, 9 Wall. 1. *Special acts, personal services, etc.:* See Rhodes v. Rhodes, 3 Sand. Ch. 279, 284; Davison v. Davison, 13 N. J. Eq. 246; Vanduyne v. Vreeland, 12 N. J. Eq. 142, 151; Twiss v. George, 33 Mich. 253; Johnson v. Hubbell, 10 N. J. Eq. 332; 66 Am. Dec. 773; Cronk v. Trumble, 66 Ill. 482; Edwards v. Estell, 48 Cal. 194.

[1] If the vendor has disabled himself from performance after making the contract, and if the disability existed at the time of making the contract from a defect in his title, a court of equity will, in either of these cases, award damages to the vendee-plaintiff, provided he commenced his suit in good faith, without any knowledge of the disability: See Milkman v. Ordway, 106 Mass. 232, 253; Chartier v. Marshall, 56 N. H. 478; Wiswall v. McGowan, Hoff. Ch. 125; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273; Morss v. Elmendorf, 11 Paige, 277; Berry v. Van Winkle, 2 N. J. Eq. 269; Hopkins v. Gilman, 22 Wis. 476; Tenney v. State Bank, 20 Wis. 152; McQueen v. Chouteau's Heirs, 20 Mo. 222; 64 Am. Dec. 178; Hamilton v. Hamilton, 59 Mo. 232; Gupton v. Gupton, 47 Mo. 37, 47; Harrison v. Deramus, 33 Ala. 463; Carroll v. Wilson, 22 Ark. 32; Foley v. Crow, 37 Md. 51; but will not, in general, grant damages if the plaintiff was aware of the disability at the time of bringing his suit: Ibid.; Hatch v. Cobb, 4 Johns. Ch. 559; Kempshall v. Stone, 5 Johns. Ch. 193; Smith v. Kelley, 56 Me. 64; Sternberger v. McGovern, 56 N. Y. 12, 20. For a full and able discussion of the rules as to damages in equity, see Woodman v. Freeman, 25 Me. 531, 532, 543.

CHAPTER SECOND.

SPECIFIC ENFORCEMENT OF OBLIGATIONS ARISING FROM TRUSTS AND FIDUCIARY RELATIONS.

ANALYSIS.

§ 1411. General nature, kinds, and classes.
§ 1412. Suits against corporations to compel the transfer or issue of stock.

§ 1411. **General Nature, Kinds, and Classes.**— The nature and objects of the various remedies included in this division are sufficiently indicated by the title, and need no further description. The remedies belonging to the class are suits to enforce express trusts, either private or charitable; suits to enforce resulting or constructive trusts by compelling a conveyance of the legal title; suits against persons in fiduciary relations; suits against administrators or executors; and suits against corporations and their managing officers. The jurisdiction to entertain these suits and to grant these remedies has been described in previous chapters.[1] There remains one particular remedy to be briefly considered,— the suit by a stockholder against a corporation to compel the transfer or issue of stock.

§ 1412. **Suits against Corporations to Compel the Transfer or Issue of Stock.**— Cases frequently arise where corporations or joint-stock companies refuse to recognize the rights of assignees of stock, and make the transfers on their books and issue new certificates in place of the old ones presented, or where certificates have been presented to the company without the owner's consent and negligence, and new cer-

[1] See *ante*, concerning charitable trusts, §§ 1018–1029; express private trusts: §§ 1059–1087; resulting and constructive trusts: §§ 1030–1058; fiduciary persons, guardians, etc.: §§ 1088, 1097; administration suits: §§ 1152–1154; and see Peyser v. Wendt, 87 N. Y. 322; suits against corporations and their managing officers: §§ 1089–1096; and see Brinckerhoff v. Bostwick, 88 N. Y. 52; Van Dyck v. McQuade, 86 N. Y. 38, 45, 46.

tificates have been issued instead thereof to others purporting to be entitled thereto. In such cases it is well settled that although the law may give some remedy, as that of damages, for the refusal, equity has jurisdiction to compel the corporation to make the transfer and issue new certificates in the one case, to the lawful assignee;[1] and in the other, to decree that the corporation replace the stock upon its books, and issue new certificates to the original owner, or if it is unable to do this by reason of its not having or being able to procure any shares, to pay the value of the stock.[2]

[1] Cushman v. Thayer Mfg. Co., 76 N. Y. 365; 32 Am. Rep. 315; Middlebrook v. Merchants' Bank, 41 Barb. 481; 3 Abb. App. 295; Purchase v. N. Y. Exch. Bank, 3 Rob. (N. Y.) 164. It has been said, in analogy to suits for specific performance of sales of stock, that the action is proper, in this case, where a recovery of damages would furnish inadequate compensation: Cushman v. Thayer Mfg. Co., *supra*. In Burrall v. Bushwick R. R., 75 N. Y. 211, an action was brought to obtain the issue and delivery of a certain number of *shares* of capital stock, in accordance with what purported to be the terms of a certificate. Held, that a subscriber may become the owner of shares, but not in the sense that he can take them away out of the corporate fund. The corporation has no power, and cannot be compelled while continuing its legal existence and carrying on its affairs, to issue and deliver such shares; it can only be compelled to issue their legal evidence, in the shape, generally, of stock certificates.

[2] Hildyard v. South Sea Co., 2 P. Wms. 77; Ashby v. Blackwell, 2 Eden, 299; Sloman v. Bank of England, 14 Sim. 475; Taylor v. Midland R'y Co., 28 Beav. 287; 8 H. L. Cas. 751; Pollock v. National Bank, 7 N. Y. 274; 57 Am. Dec. 520; Chew v. Bank of Baltimore, 14 Md. 299 (sale of stock by lunatic); Sewall v. Boston etc. Co., 4 Allen, 277; 81 Am. Dec. 701; Pratt v. Taunton Copper Co., 123 Mass. 110; 25 Am. Rep. 37; Pratt v. Boston etc. R. R., 126 Mass. 443; Telegraph Co. v. Davenport, 97 U. S. 369.

The cases under this head almost invariably arise where the owner's name has been forged. It is no answer that the officers of the company have been without blame in allowing the unauthorized transfer, or that the certificate was obtained by a purchaser in good faith: See Telegraph Co. v. Davenport, *supra*. Dividends received on the stock after the unauthorized transfer will be ordered by the decree to be paid by the corporation: See the cases above cited.

SIXTH GROUP.

REMEDIES IN WHICH THE FINAL RELIEF IS PECUNIARY, BUT IS OBTAINED BY THE ENFORCEMENT OF A LIEN OR CHARGE UPON SOME SPECIFIC PROPERTY OR FUND.

CHAPTER FIRST.

FORECLOSURE SUITS — MARSHALING SECURITIES — CREDITORS' SUITS.

ANALYSIS.

§ 1413. Nature, kinds, and classes.
§ 1414. Suits for marshaling of securities.
§ 1415. Creditors' suits.

§ 1413. Nature, Kinds, and Classes.— The title of this group plainly indicates the nature and object of the remedies composing it. They are all purely equitable, and therefore belong to the exclusive jurisdiction; because, although the *final* relief is pecuniary, and so resembles the ordinary relief at law, it is obtained through preliminary proceedings, forming a part of the judgment, which belong solely to the procedure and jurisdiction of equity. The group contains the following species of remedies: Suits for the foreclosure by judicial sale of mortgages of real property; suits for the similar foreclosure of mortgages of personal property; suits for the similar foreclosure of pledges; suits to enforce the various equitable liens; suits to enforce the equitable contracts of married women upon their separate property; suits to marshal securities; and creditors' suits. The jurisdiction to entertain most of these suits — when and between what parties most of these remedies will be granted — has already been discussed as fully

as my limits will permit.[1] I shall briefly consider in the present chapter marshaling of securities and creditors' suits.

§ 1414. Marshaling of Securities.— The equitable remedy of marshaling securities, with that of marshaling assets, depends upon the principle that a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund. The general rule is, that if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only,— as, for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another,— the former must seek satisfaction out of that fund which the latter cannot touch.[1] If, therefore, the prior creditor resorts to the doubly

§ 1413, [1] See *ante,* foreclosure of mortgages of land: § 1228; of mortgages of chattels: § 1230; of pledges: § 1231. The enforcement of equitable liens: arising from express contract: §§ 1235–37; from implied contract: §§ 1239–1243; from charges by will or deed: §§ 1245–1247; grantor's lien: §§ 1249–1258; vendor's lien: § 1262; vendee's lien: § 1263; deposit of title deeds: § 1267; statutory liens: § 1269. Suits to enforce the equitable contracts of married women upon their separate property: §§ 1121–1126. Although the late English cases hold that these contracts of married women do *not* create any lien, yet the whole remedy in form and substance is exactly the same as though there *was* a lien, and as though its object was to enforce that lien. Furthermore, the American courts generally hold that a lien *is* created. "Creditors' suits" belong to this group, because they are based upon the conception that an equitable lien is created upon the judgment debtor's property, by means of the judgment and execution returned unsatisfied; and this lien is in reality enforced, although the enforcement may, perhaps, require the ancillary remedies of cancellation, a receiver, etc.

§ 1414, [1] Lanoy v. Duke of Athol, 2 Atk. 444, 446; Aldrich v. Cooper, 8 Ves. 382, 395; 2 Lead. Cas. Eq., 4th Am. ed., 2280, notes; Ex parte Kendall, 17 Ves. 514, 520; Baldwin v. Belcher, 3 Dru. & War. 173, 176; Hughes v. Williams, 3 Macn. & G. 683; Tidd v. Lister, 10 Hare, 140. 157, 3 De Gex, M. & G. 857; Averall v. Wade, Lloyd & G. 252; Gibson v. Seagrim, 20 Beav. 614; Hales v. Cox, 32 Beav. 118; Ex parte Alston, L. R. 4 Ch. 168; Heyman v. Dubois, L. R. 13 Eq. 158; Cheesebrough v. Millard, 1 Johns. Ch. 409; 7 Am. Dec. 494; Hawley v. Mancius, 7 Johns. Ch. 174, 184; Evertson v. Booth, 19 Johns. 486, 492; Besley v. Lawrence, 11 Paige, 581; York etc. Ferry Co. v. Jersey Co., Hopk. Ch. 460; Ziegler v. Long, 2 Watts, 205; Pallen v. Agricultural Bank, Freem. (Miss.) 419; Glass v. Pullen, 6 Bush, 346; Russell v. Howard, 2 McLean, 489; Ross v. Duggan, 5 Col. 85; Terry v. Rosell, 32 Ark. 478.

charged fund, the subsequent creditor will be substituted, as far as possible, to his rights.[2] These rules must be taken with the modifications and exceptions that in their application the paramount encumbrancer shall not be delayed or inconvenienced in the collection of his debt, for it would be unreasonable that he should suffer because some one else has taken imperfect security;[3] that the rights of third parties shall not be prejudiced;[4] and that the parties themselves are creditors of the same debtor.[5] The rules of marshaling securities are applied under a variety of circumstances; but generally, in this country, between mortgagees, mortgagees and judgment creditors, and between judgment creditors.[6]

§ 1415. **Creditors' Suits.**— The jurisdiction of equity to entertain suits in aid of creditors[1] undoubtedly had its origin in the narrowness of the common-law remedies by

2 Cheesebrough v. Millard, 1 Johns. Ch. 409; Hunt v. Townsend, 4 Sand. Ch. 510; Herriman v. Skillman, 33 Barb. 378; Bank of Kentucky v. Vance's Adm'rs, 4 Litt. 168; Ramsey's Appeal, 2 Watts, 228; 27 Am. Dec. 301.

3 Evertson v. Booth, 19 Johns. 486, 493; Woolcocks v. Hart, 1 Paige, 185; Jervis v. Smith, 7 Abb. Pr., N. S., 217; Briggs v. Planters' Bank, Freem. (Miss.) 574; Denham v. Williams, 39 Ga. 312; Calloway v. People's Bank, 54 Ga. 572; Walker v. Covar, 2 S. C. 16; Coker v. Shropshire, 59 Ala. 542; Sweet v. Redhead, 76 Ill. 374; Wolf v. Smith, 36 Iowa, 454.

4 Barnes v. Racster, 1 Younge & C. Ch. 401; Averall v. Wade, Lloyd & G. 252; Cannon v. Kreipe, 14 Kan. 324; Leib v. Stribling, 51 Md. 285; McArthur v. Martin, 23 Minn. 74 (homestead right); Marr v. Lewis, 31 Ark. 203; 25 Am. Rep. 553 (ditto).

5 Ex parte Kendall, 17 Ves. 514, 520; Dorr v. Shaw, 4 Johns. Ch. 17; Stevens v. Church, 41 Conn. 369. The rule, also, does not apply between a debtor and his creditor, but only between different creditors: Rogers v. Meyers, 68 Ill. 92.

6 When creditor No. 1 has a lien upon two funds, A and B, and creditor No. 2 has a subsequent lien upon fund B alone, the theory of the remedy is, that the lien of creditor No. 2 is transferred to and enforced against fund A. It is possible that some cases may have carried the principle to the extent of permitting creditor No. 2 to maintain an equitable suit for the purpose of compelling creditor No. 1 to enforce his security, in the first place, out of fund A, so as to leave fund B, if possible, subject to the plaintiff's subsequent lien. This form of the relief is not, in my opinion, warranted by the principle; it was not allowed in the analogous remedy of marshaling assets; and it seems to interfere with the prior vested rights of creditor No. 1.

1 Creditors' suits may be brought either while the debtor is living, or after

writs of execution. These writs, issued by courts of common law, besides being otherwise limited in their operation, were. of course, confined to those estates and interests recognized by the law, and did not extend to estates and interests equitable in their nature. Creditors' suits were therefore permitted to be brought in those instances where the relief by execution at common law was ineffectual; as for a discovery of assets;[2] to reach equitable and other interests not subject to levy and sale at law;[3] and to set aside fraudulent conveyances and obstructions.[4] Statutes in England and in certain American states have greatly extended the scope of writs of execution, thereby providing for adequate legal relief in cases where formerly resort to equity was necessary, and even extending the relief to instances where, perhaps, a creditor's bill would not lie.[5] In

his death against his estate In the latter case, the suit ends in administration, if the executor or administrator does not admit assets. If assets are admitted, a decree is simply made for payment of the debt. The jurisdiction of equity to entertain suits of this latter class has been considered under the head of Administration: See *ante*, § 1154. The present discussion will be confined to suits of the first class.

[2] Hadden v. Spader, 20 Johns. 554; 5 Johns. Ch. 280; Hendricks v. Robinson, 2 Johns. Ch. 283; Gordon v. Lowell, 21 Me. 251; Bay State Iron Co. v. Goodall, 30 N. H. 223; Miers v. Zanesville etc. Co., 11 Ohio, 273; Cadwallader v. Granville etc. Soc., 11 Ohio, 292; Thomas v. Adams, 30 Ill. 37; Clarke v. Webb, 2 Hen. & M. 8; Le Roy v. Rogers, 3 Paige, 234; Trego v. Skinner, 42 Md. 426.

[3] Halsted v. Davison, 10 N. J. Eq. 293; Montgomery v. McGee, 7 Humph. 234; Wallace v. Smith, 2 Handy, 78; Galveston etc. R'y v. McDonald, 53 Tex. 510; Lackland v. Garesche, 56 Mo. 267; Harris v. Alcock, 10 Gill & J. 226; 32 Am. Dec. 158; Rose v. Bevan, 10 Md. 466; 69 Am. Dec. 170; Hadden v. Spader, 20 Johns. 554; 5 Johns. Ch. 280; Bayard v. Hoffman, 4 Johns. Ch. 450; Tompkins v. Fonda, 4 Paige, 448.

[4] Beck v. Burdett, 1 Paige, 305; 19 Am. Dec. 436; Gates v. Boomer, 17 Wis. 455; Hagan v. Walker, 14 How. 29; Hammond v. Hudson River etc. Co., 20 Barb. 378; McCaffrey v. Hickey, 66 Barb. 489; Tantum v. Green, 21 N. J. Eq. 364; Pulliam v. Taylor, 50 Miss. 551; Trego v. Skinner, 42 Md. 426.

[5] In England, by the statute of frauds, 29 Car. II., c. 3, sec. 10, legal execution was given against the lands, tenements, and hereditaments of a person seised in trust for the debtor at the time of execution sued out. This exception to the property capable of being reached by the ordinary writs was obviously very narrow,—extending only to real estate *seised* in trust at the *time* of execution sued out, and not embracing chattels real, trusts under

other states, statutes have increased the efficiency of creditors' suits by dealing with the subject directly. It is a necessary result from the whole theory of the creditors' suits that jurisdiction in equity will not be entertained where there is a remedy at law.[6] The general rule is, therefore, that a judgment must be obtained, and certain steps taken towards enforcing or perfecting such judgment, before a party is entitled to institute a suit of this character.[7] In this there is a uniformity of opinion, but the difficulty arises in determining exactly how far a plaintiff should proceed after he has obtained his judgment.[8] It is, of course, neces-

which the debtor had not the whole interest, equities of redemption, or any equitable interest parted with before execution sued out: See Forth v. Duke of Norfolk, 4 Madd. 503. By statute 1 & 2 Vict., c. 110, the remedies of creditors by ordinary writs of execution are very complete. As an example of the legislation in American states of the first type referred to in the text, see Cal. Code Civ. Proc., sec. 688.

6 See the cases cited in the next note but one.

7 It is impossible to state a more definite rule than this, as will subsequently appear.

8 *When an execution returned unsatisfied is or is not an essential preliminary.*— Much of the conflict doubtless results from the effect judgments and writs of execution have in different states. The rule seems to be sustained by the weight of authority, that before a creditor's suit can be brought to reach choses in action and personal property in such a shape or form or under such conditions that no levy can be made at law, execution must have been issued and a return of *nulla bona* made: Beck v. Burdett. 1 Paige, 305, 309; Willis v. Moore, Clarke Ch. 150; Spader v. Davis, 5 Johns. Ch. 280; 20 Johns. 554; Brinkerhoff v. Brown, 4 Johns. Ch. 671; McElwain v. Willis, 9 Wend. 548, 562, 565, 569; Beardsley Scythe Co. v. Foster, 36 N. Y. 561; Dunlevy v. Tallmadge, 32 N. Y. 457; Crippen v. Hudson, 13 N. Y. 161; Parshall v. Tillon, 13 How. Pr. 7; Scott v. Wallace, 4 J. J. Marsh. 654; Wooley v. Stone, 7 J. J. Marsh. 302; Morgan v. Crabb, 3 Port. 470; Brown v. Bank of Mississippi, 31 Miss. 454; Suydam v. North West Ins. Co., 51 Pa. St. 394. On the other hand, where it is sought to reach equitable interests of a debtor in, or to remove fraudulent obstructions from, real property, judicial opinion inclines in favor of the rule that execution must have been issued, but a return is unnecessary: Neate v. Duke of Marlborough, 3 Mylne & C. 407· Shirley v. Watts, 3 Atk. 200; North American F. Ins. Co. v. Graham, 5 Sand. 197; McCullough v. Colby, 5 Bosw. 477; Hendricks v. Robinson, 2 Johns. Ch. 283, 296; Beck v. Burdett, 1 Paige, 305. 308; 19 Am. Dec. 436; McElwain v. Willis, 9 Wend. 548, 568; Buswell v. Lincks, 8 Daly, 518; Geery v. Geery, 63 N. Y. 252; Jones v. Green, 1 Wall. 330; Manchester v. McKee, 4 Gilm. 511; Thurmond v. Reese, 3 Ga. 449; 46 Am. Dec. 440; Newman v. Willetts, 52 Ill. 98; Loving v. Pairo, 10 Iowa, 282; 77 Am. Dec. 108; Miller

sary for the creditor to allege and prove that he has taken the necessary proceedings at law before he can show a case requiring the interposition of equity. Whether an equitable suit, analogous to the creditor's suit, will be allowed in aid

v. Dayton, 47 Iowa, 312. The equitable relief in this case rests on the fact that the judgment is or is in the nature of a lien, which should be perfected by an execution taken out, in which stage of the proceedings a creditor will be assisted. As regards choses in action and personal property, however, under the above circumstances, no specific lien is created until proceedings are taken in equity. It therefore follows from the preceding that if the judgment itself constitutes, or is held to constitute, a specific lien, execution is unnecessary: Cornell v. Radway, 22 Wis. 260; Fleming v. Grafton, 54 Miss. 79; McNairy v. Eastland, 10 Yerg. 310; Montgomery v. McGee, 7 Humph. 234; and where the judgment constitutes no lien on real estate, the creditor must make a levy, if the debtor has the legal title, and if he has but an equitable title, execution must be returned, as in the case of personal property, before a suit in equity can be maintained: Webster v. Clark, 25 Me. 313; Dana v. Haskell, 41 Me. 25; Hartshorn v. Eames, 31 Me. 93; Corey v. Greene, 51 Me. 115; Dockray v. Mason, 48 Me. 178; Griffin v. Nitcher, 57 Me. 270, 272.

Special exceptions.— The circumstances constituting exceptions to the general rule as stated in the text are not numerous; and as to what will excuse issuing of an execution, or issuing of an execution and a return unsatisfied, the cases are not unanimous. In Shaw v. Dwight, 27 N. Y. 244, 84 Am. Dec. 275, where it was sought to set aside fraudulent obstructions, issuing of execution in counties where the lands were situated was held unnecessary, an execution having been issued in the county where the debtor resided, and returned unsatisfied. And see Payne v. Sheldon, 63 Barb. 169. Where a judgment was obtained against one of two persons sued as joint debtors, and an execution thereon was returned unsatisfied, a creditor's suit may be begun without proceeding to judgment and execution against the other joint debtor: Hiler v. Hetterick, 5 Daly, 33; see Voorhees v. Howard, 4 Abb. App. 503. Whether the debtor's insolvency will obviate the necessity of proceeding at law in the same manner as if he were solvent is unsettled; it has been held on the one side that insolvency is an excuse: Tabb v. Williams, 4 Jones Eq. 352; Turner v. Adams, 46 Mo. 95; and on the other, that it is not: Mixon v. Dunklin, 48 Ala. 455; Parish v. Lewis, Freem. (Miss.) 299.

There are exceptions to the rule even that a judgment is required. Thus it is held that under certain circumstances equity will lend its aid to set aside fraudulent conveyances of property and apply it to a creditor's demands, by a proceeding that may be called "equitable attachment," without a judgment having been obtained, where the debtor has absconded, or removed from or resides out of the state: Scott v. McMillen, 1 Litt. 302; 13 Am. Dec. 239; Kipper v. Glancey, 2 Blackf. 356; Peay v. Morrison's Ex'rs, 10 Gratt. 149; Pope v. Solomon, 36 Ga. 541; and to reach money of an absconding debtor not subject to garnishment at law: Pendleton v. Perkins, 49 Mo. 565.

In aid of attachments.— An exception has been sought to be made in the

of the lien created by an attachment, before the recovery of judgment, is a question to which the American courts have given directly conflicting answers.

case of attaching creditors, and the question has been presented whether equity will ever assist an attachment at law. It has been held, in accordance with the prevailing theory, that a creditor's suit may be maintained to reach real estate when a specific lien is created, that an attachment constitutes such a lien as to furnish ground for equitable interference to remove fraudulent obstructions or impediments on the property, real or personal, attached, without the requirement of a judgment obtained, or the steps subsequent thereto, necessary in ordinary creditors' suits: Falconer v. Freeman, 4 Sand. Ch. 565; Greenleaf v. Mumford, 19 Abb. Pr. 469; Skinner v. Stuart, 15 Abb. Pr. 391; Bates v. Plonsky, 62 How. Pr. 429; Kelly v. Lane, 42 Barb. 594; Mechanics' etc. Bank v. Dakin, 51 N. Y. 519; Heyneman v. Dannenberg, 6 Cal. 376; 65 Am. Dec. 519; Scales v. Scott, 13 Cal. 76; Robert v. Hodges, 16 N. J. Eq. 299; Curry v. Glass, 25 N. J. Eq. 108; Hunt v. Field, 9 N. J. Eq. 36; 57 Am. Dec. 365; Williams v. Michenor, 11 N. J. Eq. 520; Ward v. McKenzie, 33 Tex. 297; 7 Am. Rep. 261; Tappan v. Evans, 11 N. H. 311; Dodge v. Griswold, 8 N. H. 425; Stone v. Anderson, 26 N. H. 506; Sheafe v. Sheafe, 40 N. H. 516; see Castle v. Bader, 23 Cal. 76. In pursuance of this doctrine, when the attaching creditor or officer is sued for taking the property, it may be shown as a good defense that the plaintiff's title is fraudulent: Hall v. Stryker, 27 N. Y. 596; Rinchey v. Stryker, 28 N. Y. 45; 84 Am. Dec. 324; 31 N. Y. 140. Other decisions hold that such a suit cannot be maintained: Thurber v. Blanck, 50 N. Y. 80; Lawrence v. Bank of Republic, 35 N. Y. 320; Greenleaf v. Mumford, 50 Barb. 543; Griffin v. Nitcher, 57 Me. 270; Tennent v. Battey, 18 Kan. 324; Weil v. Lankins, 3 Neb. 384; Bigelow v. Andress, 31 Ill. 322; Martin v. Michael, 23 Mo. 50; 66 Am. Dec. 656; McMinn v. Whelan, 27 Cal. 300.

SEVENTH GROUP.

REMEDIES IN WHICH THE FINAL RELIEF IS WHOLLY PECUNIARY, AND IS OBTAINED IN THE FORM OF A GENERAL PECUNIARY RECOVERY.

CHAPTER FIRST.

SUITS FOR CONTRIBUTION, EXONERATION, AND SUBROGATION.

ANALYSIS.

§ 1416. General nature, kinds, and classes.
§ 1417. Exoneration; rights of surety against the principal debtor.
§ 1418. Contribution.
§ 1419. Subrogation.

§ 1416. General Nature, Kinds, and Classes.— The remedies composing this group belong to the concurrent jurisdiction of equity, since the final reliefs are the same in form and substance as that granted under like circumstances by a judgment at law,— a general pecuniary recovery,— and since the primary rights and interests of the parties are generally recognized and protected by the law. Within the group are included suits by assignees of things in action; suits by equitable assignees of a fund;[1] suits for contribution in general; suits for contribution, exoneration, and subrogation, growing out of suretyship; suits for an accounting in general; and suits under various circumstances, and between particular parties, in which an accounting is a necessary element of the relief,— as, for example, between partners.

[1] As to suits by assignees of things in action, see *ante*, §§ 1277, 1278; by equitable assignees of a fund: §§ 1280–1284.

§ 1417. Exoneration — Rights of Surety against the Principal Debtor.— When a surety has actually paid or satisfied the principal's obligation, or any part thereof, he is entitled to be reimbursed by the principal debtor, and can maintain an equitable action for that purpose.[1] He may also maintain a *quia timet* suit in equity before any payment.

[1] The right of recovery being based upon an implied contract of the principal, a jurisdiction at law to give the same relief has become established, and is ordinarily resorted to in this country. The equitable jurisdiction, however, still exists. The surety is entitled to exoneration, whether his payment was voluntary or compulsory; if compulsory, he can recover back his reasonably necessary costs and expenses. The jurisdiction extends to all those who in reality stand in a position of suretyship towards principal debtors; e. g., to a surety *for a prior surety:* Dering v. Earl of Winchelsea, 1 Cox, 318; 1 Lead. Cas. Eq., 4th Am. ed., 120, 124, 134; Craythorne v. Swinburne, 14 Ves. 160; Hazelton v. Valentine, 113 Mass. 472, 479; Savage v. Winchester, 15 Gray, 453; Konitzky v. Meyer, 49 N. Y. 571; Townsend v. Whitney, 75 N. Y. 425; Harris v. Warner, 13 Wend. 400; Neimcewicz v. Gahn, 3 Paige, 614; 11 Wend. 312; Wesley Church v. Moore, 10 Pa. St. 273; Baxter v. Moore, 5 Leigh, 219; Butler v. Butler's Adm'r, 8 W. Va. 677; Hare v. Grant, 77 N. C. 203; Moore v. Young, 1 Dana, 516; Hamilton v. Johnston, 82 Ill. 39; Hearne v. Keath, 63 Mo. 84. If the surety satisfies the obligation at less than its full amount, he can only recover from the principal debtor what he has actually paid, or the value of the property given up: Reed v. Norris, 2 Mylne & C. 361, 375; Bonney v. Seely, 2 Wend. 481; Blow v. Maynard, 2 Leigh, 30.

Suit before payment.— After the obligation becomes payable, the surety, before he has paid it, and whether he has been sued by the creditor or not, may maintain a suit in equity against the debtor — in the nature of a bill *quia timet* — to compel *him* to pay the debt or perform the obligation; provided the creditor can himself enforce payment or performance, and neglects or refuses to do so. The creditor is, of course, made a co-defendant: Cal. Civ. Code, sec. 2846; Dering v. Earl of Winchelsea, *supra;* notes in 2 Lead. Cas. Eq., 4th Am. ed., 278, 280, 283, 306, 1896; Nisbet v. Smith, 2 Brown Ch. 579, 582; Comes Ranelaugh v. Hayes, 1 Vern. 189; Antrobus v. Davidson, 3 Mer. 569; Padwick v. Stanley, 9 Hare, 627; Wooldridge v. Norris, L. R. 9 Eq. 410; Beaver v. Beaver, 23 Pa. St. 167; Ardesco Oil Co. v. N. A. Oil etc. Co., 66 Pa. St. 375, 381; Bishop v. Day, 13 Vt. 81; 37 Am. Dec. 582; Hayes v. Ward. 4 Johns. Ch. 123, 131; 8 Am. Dec. 554; King v. Baldwin, 2 Johns. Ch. 554; 17 Johns. 384; Norton v. Reid, 11 S. C. 593; White v. Schurer, 4 Baxt. 23; Gilliam v. Esselman, 5 Sneed, 86; Irick v. Black, 17 N. J. Eq. 189; Stephenson v. Taverners, 9 Gratt. 389; Rice v. Downing, 12 B. Mon. 44; Dempsey v. Bush, 18 Ohio St. 376; Fame Ins. Co.'s Appeal, 83 Pa. St. 396, 405. Conversely, when the surety has been discharged by the acts of the creditor in dealing with the principal debtor, he may maintain a suit in equity for a decree declaring his liability at an end, and restraining the creditor if necessary: See Morley v. Dickinson, 12 Cal. 561.

§ 1418. Contribution.— Where there are two or more sureties for the same principal debtor, and for the same debt or obligation, whether on the same or on different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all of his co-sureties, in order to reimburse him for the excess paid over his share, and thus to equalize their common burdens. The same doctrine applies, and the same remedy is given, between all those who are jointly, or jointly and severally, liable on contract or obligation in the nature of contract.[1] The right,

[1] The doctrine of contribution rests upon the maxim, Equality is equity: See vol. 1, §§ 405–412. Although contribution is based upon general considerations of justice, and not upon any notion of an implied promise, a jurisdiction at law has become well settled which is sufficient in all ordinary cases of suretyship or joint liability. The equitable jurisdiction still remains, and has some most important advantages. All the co-sureties and the principal debtor being parties to the equity suit, the liabilities of each and their exoneration by the principal debtor can be adjusted and established by a single decree. If one or more of the co-sureties are insolvent, the plaintiff can in equity obtain a proportionate increase of contribution from the others who are solvent. It seems, however, that the surety must first resort to the principal debtor; and that he can only compel contribution in equity when he has failed to obtain exoneration from the principal. Of course, there can be no such limitation to a contribution among joint debtors not sureties. There is no contribution among tort-feasors. As to contribution among co-trustees, see *ante*, § 1081; among owners of lands subject to encumbrance: §§ 1221–1226. As illustrations of the general doctrine, see Dering v. Earl of Winchelsea, 1 Cox, 318; 1 Lead. Cas. Eq. 120, 124, 134; Craythorne v. Swinburne, 14 Ves. 160; Primrose v. Bromley, 1 Atk. 89; Stirling v. Forrester, 3 Bligh, 575; Yonge v. Reynell, 9 Hare, 809; Hitchman v. Stewart, 3 Drew. 271; Mayor of Berwick v. Murray, 7 De Gex, M. & G. 497; Whiting v. Burke, L. R. 6 Ch. 342; Hichborn v. Fletcher, 66 Me. 209; 22 Am. Rep. 562; Morgan v. Smith, 70 N. Y. 537; Wells v. Miller, 66 N. Y. 255; Johnson v. Harvey, 84 N. Y. 363; 38 Am. Rep. 515; Smith v. State, 46 Md. 617; Nally v. Long, 56 Md. 567; Bright v. Lennon, 83 N. C. 183; Scofield v. Gaskill, 60 Ga. 277; Owen v. McGehee, 61 Ala. 440; Broughton v. Wimberly, 65 Ala. 549; Jenkins v. Lockard's Adm'r, 66 Ala. 377; Magruder v. Admire, 4 Mo. App. 133; Stephens v. Meek, 6 Lea, 226; Oldham v. Broom, 28 Ohio St. 41; Camp v. Bostwick, 20 Ohio St. 337; 5 Am. Rep. 669; Robertson v. Deatherage, 82 Ill. 511; Conover v. Hill, 76 Ill. 342; Wagenseller v. Prettyman, 7 Ill. App. 192; Curtis v. Parks, 55 Cal. 106; Taylor v. Reynolds, 53 Cal. 686; Powell v. Powell, 48 Cal. 234; Dussol v. Bruguiere, 50 Cal. 456; Black v. Shreeve, 7 N. J. Eq. 440; Bowen v. Hoskins, 45 Miss. 183; 7 Am. Rep. 728; Mills v. Hyde, 19 Vt. 59; 46 Am. Dec. 177; Strong v. Mitchell, 19 Vt. 644; Wayland v. Tucker, 4 Gratt. 267; 50 Am. Dec. 76; Campbell v. Mesier, 4 Johns. Ch. 334; 8 Am. Dec. 570; 6 Johns. Ch. 21. *Where one or more co-sureties are*

however, may be controlled or modified by express agreement among the co-sureties or debtors.

§ 1419. Subrogation.— The surety who has paid or satisfied the principal's debt or obligation is entitled to be subrogated to and to have the benefit of all securities which may at any time have been put into the creditor's hands by the principal debtor, or which the creditor may have obtained from the principal debtor. By the fact of payment, the surety becomes an equitable assignee of all such securities, and is entitled to have them assigned and delivered up to him by the creditor, in order that he may enforce them for his own reimbursement and exoneration. If, therefore, the creditor refuses to surrender up such securities, the surety may maintain an equitable suit to compel their assignment and surrender. The doctrine and remedy of subrogation are extended also to the creditor, who is subrogated to and entitled to the benefit of all securities given to a surety for purposes of *his* indemnification by the principal debtor; and also between co-sureties, so that one surety, in enforcing his rights of exoneration and of contribution, is subrogated to securities given to his co-surety.[1] It necessarily follows from the surety's right of

insolvent: Hitchman v. Stewart, 3 Drew. 271; Mayor etc. v. Murray, 7 De Gex, M. & G. 497; Magruder v. Admire, 4 Mo. App. 133; Burrows v. McWhann, 1 Desaus. Eq. 409; Breckinridge v. Taylor, 5 Dana, 110. On death of a co-surety, his estate is liable to contribute: Primrose v. Bromley, 1 Atk. 89; Dussol v. Bruguiere, 50 Cal. 456; Johnson v. Harvey, 84 N. Y. 363; 38 Am. Rep. 515; Stephens v. Meek, 6 Lea, 226.

[1] The doctrine of subrogation is of wide extent and operation in various departments of equity jurisprudence. The grounds and reasons upon which it depends have already been explained. Being a doctrine of purely equitable origin and nature, its operation is always controlled by equitable principles. It is, therefore, never enforced so as to defeat or interfere with the superior or equal equities of third persons, or with the legal right of third persons growing out of express contract. As to subrogation among encumbrancers, see *ante*, §§ 1211–1214. The remedy of subrogation has been granted to sureties much more favorably and extensively by the American equity jurisprudence than by the English. In England, prior to modern legislation, if a surety paid a contract which he executed jointly with his principal debtor, or paid a judgment recovered against him and his principal jointly, the contract or judgment was thereby ended and discharged, and could not itself be enforced by the surety. The courts of all the American states, with very few

subrogation that the creditor cannot, without the surety's assent, surrender, give up, release, or discharge any such securities, or render them in any way unavailable to the surety, either by his own acts or omissions. If he does so, the surety's liability is thereby discharged, wholly or partially, as the case may be.

exceptions, have extended the remedy of subrogation to such cases; they enable the surety to enforce such bond, or contract, or judgment immediately against the principal debtor, although the surety was himself directly liable. In other words, by the English doctrine, the surety became equitable assignee only of collateral securities; by the American doctrine he becomes equitable assignee, not only of collateral securities, but of the principal undertaking. As illustrations of the doctrine, see Dering v. Earl of Winchelsea, *supra;* 2 Lead. Cas. Eq. 277–291; notes to Aldrich v. Cooper, 8 Ves. 282; Mayhew v. Crickett, 2 Swanst. 185; Law v. East I. Co., 4 Ves. 824; Hodgson v. Shaw, 3 Mylne & K. 183, 190; Pearl v. Deacon, 24 Beav. 186, 1 De Gex & J. 461; Lake v. Brutton, 18 Beav. 34; 8 De Gex, M. & G. 440; Strange v. Fooks, 4 Giff. 408; Drew v. Lockett, 32 Beav. 499; Capel v. Butler, 2 Sim. & St. 457; Scribner v. Adams, 73 Me. 541; Kelly v. Herrick, 131 Mass. 373; Thompson v. White, 48 Conn. 509; Townsend v. Whitney, 75 N. Y. 425; 15 Hun, 93; Van Santen v. Standard Oil Co., 81 N. Y. 171; Cole v. Malcolm, 66 N. Y. 363; Lewis v. Palmer, 28 N. Y. 271; Steele's Appeal, 72 Pa. St. 101; Bleakley's Appeal, 66 Pa. St. 187, 191; Price v. Trusdell, 28 N. J. Eq. 200; Receivers of N. J. etc. R'y v. Wortendyke, 27 N. J. Eq. 658; Irick v. Black, 17 N. J. Eq. 189; Dent v. Wait's Adm'r, 9 W. Va. 41; Hevener v. Berry, 17 W. Va. 474; York v. Landis, 65 N. C. 535; Saffold v. Wade's Ex'r, 51 Ala. 214; Knighton v. Curry, 62 Ala. 404; Osborn v. Noble, 46 Miss. 449; Davis v. Walker, 51 Miss. 659; Talbot v. Wilkins, 31 Ark. 411; Fishback v. Weaver, 34 Ark. 569; Farmers' etc. Bank v. Sherley, 12 Bush, 304; Storms v. Storms, 3 Bush, 77; Allen v. Henley, 2 Lea, 141; Harlan v. Sweeny, 1 Lea, 682; Kirkman v. Bank of America, 2 Cold. 397; Smith v. Rumsey, 33 Mich. 183; Keith v. Hudson, 74 Ind. 333; Prout v. Lomer, 79 Ill. 331; Hollingsworth v. Pearson, 53 Iowa, 53; McArthur v. Martin, 23 Minn. 74; Eaton v. Hasty, 6 Neb. 419; 29 Am. Rep. 265; Van Orden v. Durham, 35 Cal. 136; Lidderdale's Ex'rs v. Executor of Robinson, 12 Wheat. 594; Norwood v. Norwood, 2 Har. & J. 238; Wright v. Grover, 82 Pa. St. 80; Marsh v. Pike, 10 Paige, 595; McDougald v. Dougherty, 14 Ga. 674; Neilson v. Fry, 16 Ohio St. 552; 91 Am. Dec. 110; Dearborn v. Taylor, 18 N. H. 153; Pierson v. Catlin, 18 Vt. 77; Hayes v. Ward, 4 Johns. Ch. 123; 8 Am. Rep. 554. *By surety against a co-surety:* Copis v. Middleton, Turn. & R. 224, 231; Fishback v. Weaver, 34 Ark. 569; Brown v. Ray, 18 N. H. 102; 45 Am. Dec. 361; Administrator ot Aldrich v. Hapgood, 39 Vt. 617; Elwood v. Deifendorf, 5 Barb. 398; Parham v. Green, 64 N. C. 436; McCune v. Belt, 45 Mo. 174. *By the creditor against a surety:* Moses v. Murgatroyd, 1 Johns. Ch. 119; 7 Am. Dec. 478; Phillips v. Thompson, 2 Johns. Ch. 418, 421; Rice's Appeal, 79 Pa. St. 168; Wallace's Appeal, 5 Pa. St. 103; Burwell's Adm'rs v. Fauber, 21 Gratt. 446; Osborn v. Noble, 46 Miss. 449; Rardin v. Walpole, 38 Ind. 146. As the rules concerning the discharge of the surety's liability by the conduct of the creditor are generally enforced at law as well as in equity, I do not enter upon their discussion.

CHAPTER SECOND.

SUITS FOR AN ACCOUNTING.

§ 1420. Origin of the equitable jurisdiction.
§ 1421. Extent of the equitable jurisdiction; when exercised.

§ 1420. **Origin of the Equitable Jurisdiction.**— The action of account-render was one of the most ancient actions known to the common law.[1] From the narrow scope and technical rules of this action, the inability of common-law courts to obtain a discovery from the defendant on his oath, the difficulty met with in cases of mutual and complicated accounts, and the impossibility of otherwise doing complete justice, it is easy to understand why the action of account-render fell into disuse, and a jurisdiction in equity to entertain suits for an accounting grew up.[2] The juris-

1 This action was exceedingly narrow in its operation; for it lay only in cases where there was either a privity in deed, as against a bailiff or receiver appointed by the party, or a privity in law, *ex provisione legis*, as against guardians in socage: Co. Lit. 90 b. By the law merchant, also, the action could be brought by a person, naming himself a merchant, against another, naming him a merchant, and charging him as a receiver: Co. Lit. 172 a. Statutes afterwards extended the action, which was strictly confined to these parties, to their executors and administrators: 3 & 4 Anne, c. 16; 13 Edw. I., c. 23; 31 Edw. III., c. 11. The method of procedure was, first, to obtain a preliminary judgment that the defendant do account, *quod computet*, before auditors, and then a second judgment that he pay the plaintiff the balance found to be due him: 3 Black. Com. 163. But if the balance was in favor of the defendant, the plaintiff could not be compelled to pay it: 1 Spence's Eq. Jur. 650. Besides this defect in the common-law procedure, the auditors had no power, prior to statute, of examining the parties on oath; and any disputes which arose before them on the items of account could only be settled by as many issues in court: Jeremy's Eq. Jur. 504. This action of account-render was the only means which the common law furnished of obtaining a settlement of an account, except that assumpsit might be brought for a determinate balance: 3 Black. Com. 162. But if the balance was disputed, it was necessary for the jury to investigate the items one by one, a task which was practically impossible.

2 1 Spence's Eq. Jur. 649; Mitford's Eq. Pl. 120, 123; Bacon Abr., tit. Accompt. The action of account-render is perfected in several states by statute.

diction exists, therefore, and is well established; but the question arises, since there is a similar jurisdiction at law, When may a suit in equity for an accounting be brought? This question, of course, does not arise in those cases where an accounting is decreed as an incident to other equitable relief; nor should it arise where the subject-matter is an equitable interest or estate, for here the jurisdiction should be exercised as a necessary consequence, without regard to legal remedies.[3] It is not in every matter of account cognizable at law that the equitable jurisdiction will be exercised, the general rule being that a proper case is presented when the remedies at law are inadequate.[4]

§ 1421. Extent of the Equitable Jurisdiction — When Exercised.— The instances in which the legal remedies are held to be inadequate, and therefore a suit in equity for an accounting proper, are: 1. Where there are mutual accounts between the plaintiff and the defendant,— that is, where each of the two parties has received and paid on account of the other;[1] 2. Where the accounts are all on one side, but there are circumstances of great complication, or difficulties in the way of adequate relief at law;[2] 3. Where a fidu-

[3] Vol. 1, §§ 218, 219.

[4] Vol. 1, §§ 176, 178.

[1] The accounts must be mutual, as distinguished from matters of set-off, and accounts on one side only: Dinwiddie v. Bailey, 6 Ves. 136; Wells v. Cooper, cited 6 Ves. 139; Allison v. Herring, 9 Sim. 583; Phillips v. Phillips, 9 Hare, 471; Padwick v. Hurst, 18 Beav. 575; Fluker v. Taylor, 3 Drew. 183; North-eastern R'y v. Martin, 2 Phill. Ch. 758; Kennington v. Houghton, 2 Younge & C. Ch. 620, 627; Porter v. Spencer, 2 Johns. Ch. 169; Smith v. Marks, 2 Rand. 449; Hickman v. Stout, 2 Leigh, 6; McLin v. McNamara, 2 Dev. & B. Eq. 82; Hay v. Marshall, 3 Humph. 623; Wilson v. Mallett, 4 Sand. 112; Durant v. Einstein, 5 Rob. (N. Y.) 423; Salter v. Ham, 31 N. Y. 321; Walker v. Cheever, 35 N. H. 339; Gloninger v. Hazard, 42 Pa. St. 389; Passyunk Building Ass'n's Appeal, 83 Pa. St. 441; Carter v. Bailey, 64 Me. 458; 18 Am. Rep. 273; Dickinson v. Lewis, 34 Ala. 638; Avery v. Ware, 58 Ala. 475; Garner v. Reis, 25 Minn. 475; Haywood v. Hutchins, 65 N. C. 574 (accounts on both sides, but having no connection with each other). For a definition of a mutual account, see Phillips v. Phillips, 9 Hare, 471.

[2] O'Connor v. Spaight, 1 Schoales & L. 305; O'Mahony v. Dickson, 2 Schoales & L. 400; Bliss v. Smith, 34 Beav. 508; South Eastern R'y v. Brog-

ciary relation exists between the parties, and a duty rests upon the defendant to render an account.[3] A plea of stated

den, 3 Macn. & G. 8; Kennington v. Houghton, 2 Younge & C. Ch. 620, 627; Frietas v. Dos Santos, 1 Younge & J. 574; Taff Vale R'y v. Nixon, 1 H. L. Cas. 110; Mitchell v. Great Works etc. Co., 2 Story, 648; Governor v. McEwen, 5 Humph. 241; Watt v. Conger, 13 Smedes & M. 412; Kirkman v. Vanlier, 7 Ala. 217; Printup v. Mitchell, 17 Ga. 558; 63 Am. Dec. 258; Wilson v. Riddle, 48 Ga. 609; Lafever v. Billmyer, 5 W. Va. 33; Blood v. Blood, 110 Mass. 545; Frue v. Loring, 120 Mass. 507; Ward v. Peck, 114 Mass. 121; Farmers' etc. Bank v. Polk, 1 Del. Ch. 167; Trapnall v. Hill, 31 Ark. 345; Nesbit v. St. Patrick's Church, 9 N. J. Eq. 76; Seymour v. Long Dock Co., 29 N. J. Eq. 396; *contra*, Norwich etc. R. R. v. Storey, 17 Conn. 364. For cases furnishing peculiar illustrations of the latter branch of the rule, see Dabbs v. Nugent, 11 Jur., N. S., 943; Coffman v. Sangston, 21 Gratt. 263. To determine what degree of complication is required before a court of equity will entertain jurisdiction for that reason, independent of other circumstances, the rule was established in England that the account should be so complicated that a court of law would be incompetent to examine it at *nisi prius* with the necessary accuracy: O'Connor v. Spaight, 1 Schoales & L. 305, per Lord Redesdale; South Eastern R'y v. Brogden, 3 Macn. & G. 8; Kennington v. Houghton, 2 Younge & C. Ch. 620, 627; Taff Vale R'y v. Nixon, 1 H. L. Cas. 110; Foley v. Hill, 2 H. L. Cas. 28, 46. But under the present practice in England, matters of account may now be referred to officers or referees, so that the rule as above stated can now hardly be followed. The facts of each particular case should govern, and if it is doubtful whether adequate relief could be obtained at law, equity should entertain jurisdiction.

[3] This will embrace suits against trustees — including directors of corporations — which, as before stated, are particularly of equitable cognizance. Also suits for an accounting between partners; this relation necessarily giving rise to the right of an accounting in equity: Parsons on Partnership, 508. The jurisdiction of equity to compel guardians and executors and administrators to account is governed to a great extent in the United States by the powers given to courts of probate: Vol. 1, §§ 77, 78, 347–350; vol. 3, § 1154. See further, Davis v. Davis, 1 Del. Ch. 256, and State v. Quinn, 74 N. C. 359, on the accounting of guardians in equity. The principal difficulty is as to when equity will take jurisdiction of an accounting between principal and agent. The mere relation of principal and agent, without more,— the relation not being really fiduciary in its nature, and no obstacle intervening to a recovery at law,— is insufficient to enable a principal to maintain the action against his agent: King v. Rossett, 2 Young & J. 33; Navulshaw v. Brownrigg, 1 Sim., N. S., 573; 2 De Gex, M. & G. 441; Hemings v. Pugh, 4 Giff. 456; Moxon v. Bright, L. R. 4 Ch. 292; Crothers v. Lee, 29 Ala. 337 (attorney and client); Knotts v. Tarver, 8 Ala. 743 (agency for a single transaction); Coquillard v. Suydam, 8 Blackf. 24 (ditto); Blakeley v. Biscoe, 1 Hemp. 114; Powers v. Cray, 7 Ga. 206 (attorney and client); Long v. Cochran, 9 Phila. 267; County of Clinton v. Schuster, 82 Ill. 137 (not maintainable against a treasurer and assessor, as everything was a matter of record). But where the relation is such that a confidence is reposed by the principal

account obviously constitutes a bar to a suit in equity for an accounting, since in that case the remedy at law is entirely

in his agent, and the matters for which an accounting is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction: Makepiece v. Rogers, 11 Jur., N. S., 215; Hemings v. Pugh, 4 Giff. 456; Mackenzie v. Johnston, 4 Madd. 373; Moxon v. Bright, L. R. 4 Ch. 292; Southampton Dock Co. v. Southampton etc. Board, L. R. 11 Eq. 254; Thornton v. Thornton, 31 Gratt. 212; Taylor v. Tompkins, 2 Heisk. 89; Kerr v. Camden Steamboat Co., Cheves Eq. 189; Halsted v. Rabb, 8 Port. 63; Hale v. Hale, 4 Humph. 183. Other circumstances, as complication and mutuality of accounts, make a stronger case: Walker v. Spencer, 13 Jones & S. 71; Halsted v. Rabb, 8 Port. 63; Taylor v. Tompkins, 2 Heisk. 89. While the rules are thus settled in favor of a principal, it does not follow that the reverse is true, and that an agent may come into equity for an accounting against his principal, since generally there is no trust or confidence reposed in the latter, and no duty on his part to account: Padwick v. Stanley, 9 Hare, 627; Smith v. Leveaux, 2 De Gex, J. & S. 1. But there are cases where an agent may maintain the action against his principal; as, for example, where his salary depends on the profits made by his employer: Harrington v. Churchward, 6 Jur., N. S., 576; Shepard v. Brown, 4 Giff. 208; Buel v. Selz, 5 Ill. App. 116; and persons, although not technically partners, who are to receive a certain share of the profits of an undertaking, may likewise maintain the action: Bentley v. Harris, 10 R. I. 434; 14 Am. Rep. 695; Garr v. Redman, 6 Cal. 574; Ferry v. Henry, 4 Pick. 75; Hallett v. Cumston, 110 Mass. 32. The foregoing rules are applicable, for similar reasons, to part owners: Strelly v. Winson, 1 Vern. 297; McLellan v. Osborne, 51 Me. 118; Dyckman v. Valiente, 42 N. Y. 549, 563; and to tenants in common and joint tenants taking more than their share of rents and profits: Early v. Friend, 16 Gratt. 21; Leach v. Beattie, 33 Vt. 195; Wiswell v. Wilkins, 4 Vt. 137 (where there are more than two tenants concerned); Darden v. Cowper, 7 Jones, 210; 75 Am. Dec. 461; Wright v. Wright, 59 How. Pr. 176; Hodges v. Pingree, 10 Gray, 14; Blood v. Blood, 110 Mass. 545; Gates v. Frazer, 9 Ill. App. 624 (no legal liability on one joint owner to account to another with respect to the *use* of a patent right, but the action maintained under an agreement). An action by one tenant in common against another in exclusive possession to *recover* a share of rents, profits, and issues, amounting in the aggregate to a certain sum, cannot be maintained in equity: Pico v. Columbet, 12 Cal. 414; 73 Am. Dec. 550. At the common law, no action of account for taking rents and profits lay against a joint tenant or tenant in common by another, unless the defendant was constituted bailiff: Co. Lit. 200 b; but this was remedied by the statute of 4 Anne, c. 16, sec. 27, and the action could be brought against the defendant as bailiff for receiving more than his share or proportion. This statute has been substantially re-enacted in many of the American states, but the equity jurisdiction exists notwithstanding: Leach v. Beattie, 33 Vt. 195; Wright v. Wright, 59 How. Pr. 176. An accounting is often an incident to a suit for partition between joint tenants and tenants in common: See Goodenow v. Ewer, 16 Cal. 461; 76 Am. Dec. 540; Jones v. Massey, 14 S. C. 292; Tyner v. Fenner, 4 Lea, 469; Scott v. Guernsey, 48 N. Y. 106. The

adequate;[4] but of course a stated account may be opened for fraud or error.[5] The remedy of accounting is in most instances a necessary incident and part of the relief granted in suits brought by those beneficially interested, against trustees, either express or implied, and persons standing in fiduciary relations, such as administrators, executors, guardians, directors, and the like. The equitable jurisdiction is also practically exclusive in proceedings for an account and settlement of partnership affairs, including suits for an accounting and settlement of the firm affairs between the copartners themselves; suits for a settlement of the firm affairs between the survivors and the executors or administrators of the deceased, when a partner has died; and suits to settle the affairs of an insolvent firm, and to adjust the demands of the firm creditors and the creditors of the individual partners. The equitable jurisdiction over partnerships is a necessary outgrowth of the jurisdiction over accounting, and the remedies of dissolution, injunction, and receivership are incidents necessary to a final and complete relief.[6]

relation of banker and customer is not fiduciary in its character, and unless there are other circumstances, there can be no accounting between them in equity: Foley v. Hill, 2 H. L. Cas. 28.

The rule is sometimes laid down by text-writers and judges, that where accounts are all on one side, but a discovery is necessary, a proper case is presented for equitable interference, but such a rule seems to be only applicable to cases partaking of a fiduciary character: See cases *ante*, in this note. As to discovery enlarging the equitable jurisdiction over accounting, see vol. 1, §§ 223 *et seq.*

[4] Weed v. Small, 7 Paige, 573; Bullock v. Boyd, 2 Edw. Ch. 293; Dial's Ex'rs v. Rogers, 4 Desaus. Eq. 175; Craig v McKinney, 72 Ill. 305.

[5] Slee v. Bloom, 5 Johns. Ch. 366; 20 Johns. 669; Barrow v. Rhinelander, 1 Johns. Ch. 550.

[6] The subject of partnership is so broad, requiring so much discussion for its adequate treatment, that I shall not attempt to consider it. The reader is referred to the special treatises which deal with the law of partnership.

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